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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

INTERNATIONAL ASSOCIATION OF
FISH & WILDLIFE AGENCIES,
Petitioner,

v.

DEFENDERS OF WILDLIFE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does judicial supervision of the manner in which the executive branch carries out responsibilities assigned to it by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES") infringe the area of foreign policy judgment constitutionally committed to the executive?

2. Do the substantive standards of an international convention which is not self-executing take on the force of domestic law so as to enable a private suitor to found a cause of action thereon where Congress has merely empowered the executive to do the things assigned under the convention?

3. Does the decision below to displace the Scientific Authority's guidelines for determining whether export will be detrimental to the survival of the bobcat as a species in favor of the court's views on that question exceed the proper scope of judicial review or invade the domain Congress has set aside exclusively for the administrative agency where that decision fails to reflect either (a) consideration of the record supporting those guidelines or (b) observance of the arbitrary and capricious standard?

PARTIES TO PROCEEDING BELOW

The following are the parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit:

Defenders of Wildlife, Inc., appellant, cross-appellee; the Endangered Species Scientific Authority and its members Harold O'Connor, Dr. Robert L. Williamson, Dr. R.V. Miller, Dr. Joe Held, Dr. James Callahan, Mrs. Jane

Yarn, Dr. David Challinor, Dr. William Y. Brown, appellees; the Department of the Interior and the Secretary of the Interior, Cecil D. Andrus, appellees; the U.S. Fish and Wildlife Service and its Director, Lynn A. Greenwalt, appellees; the International Association of Fish and Wildlife Agencies, appellee, cross-appellant; the Fur Conservation Institute of America, appellee, cross-appellant; Raymond U. Driscoll, appellee, cross-appellant, Hartman Hide and Fur Company, appellee, cross-appellant; Charles Mock, appellee, cross-appellant; Robert Miskowitz, appellee, cross-appellant; Lester L. Newton, appellee, cross-appellant; Plott Hide & Fur Company, Inc., appellee, cross-appellant; Dr. Edward Sceery, appellee, cross-appellant; Gary J. Schroeder, appellee, cross-appellant; James W. White, appellee, cross-appellant; Phillip Worm, appellee, cross-appellant; Pacific Hide & Fur Depo, appellee, cross-appellant. Since the appeal was taken, the Endangered Species Scientific Authority has been abolished and its functions transferred to the Secretary of the Interior, to be carried out through the Fish and Wildlife Service; James G. Watt has become Secretary of the Interior; and F. Eugene Hester is Acting Director, Fish and Wildlife Service.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner International Association of Fish and Wildlife Agencies (hereinafter the "Association") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 3, 1981. The Fur Conservation Institute of America and Raymond J. Driscoll, *et al.*, appellees, cross-appellants in the court below, join in this petition.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, at p. 1a, *infra*. The opinion of the District Court for the District of Columbia, not reported, appears in the Appendix hereto, at p. 30a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1981. A timely petition for rehearing was denied on February 26, 1981, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Material portions of pertinent treaty and statutory provisions are included in the Appendix hereto. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. No. 8249, ratified by U.S. Senate, 119 Cong. Rec. 28012 (Aug. 3, 1973), appears at p. 42a, *infra*. Section 8(e) of the Endangered Species Act of 1973, (P.L. 93-205, 87 Stat. 884), 16 U.S.C. §1573(e) (1976)) appears at p. 67a, *infra*.

STATEMENT OF THE CASE

In this civil action, Plaintiff Defenders of Wildlife, Inc. (hereinafter "Defenders") asserts that the guidelines under which the Endangered Species Scientific Authority determines whether export will be detrimental to the survival of the bobcat as a species do not comply with Article IV of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES"). Defenders invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 (general federal question jurisdiction) and 1337 (regulation of commerce).

CITES is a treaty in which the United States undertakes to regulate export of (1) endangered species listed by the signatory parties on Appendix I thereof, and (2) other species listed on Appendix II which are not endangered but which could become so if trade is not monitored and regulated. CITES, Art. II (*infra*, p. 43a). In 1977 the signatory nations voted to list the

entire cat family *(Felidae)* on Appendix II, thereby adding the bobcat to that Appendix even though that species is not listed as endangered or threatened under the endangered species legislation of the United States. 16 U.S.C. §§ 1531-1543. Article IV of CITES directs each signatory to establish a system of regulating trade in species listed on Appendix II. The "Management Authority" of each nation is to grant permits allowing export of such a species only if the "Scientific Authority of the State [i.e., nation] of export has advised that such export will not be detrimental to the survival of that species." Art. IV(2)(a) and Art. IX(1)(a) (*infra*, p. 46a, 54a).

Congress provided the executive branch "the means to carry out" this regulatory scheme (119 Cong. Rec. 25,676 (1973)) by authorizing the President to designate a Management and a Scientific Authority and declaring that the "agencies so designated shall thereafter be authorized to do all things assigned to them under the Convention." Section 8(e) of the Endangered Species Act of 1973; 16 U.S.C. § 1537(e) (1976) (*infra*, p. 67a). Congress left further implementation in the hands of the Executive Branch.[1] The President established the Endangered Species Scientific Authority by Executive Order 11911 (April 13, 1976).

That Authority has moved aggressively to implement the treaty. It has determined to make individual no-detriment findings for each of the states of the United States and to remake those findings each year on the basis of current information, even though nothing in CITES suggests that no-detriment findings need be made on the basis of geographic units smaller than the nation or that such findings should be made or re-examined at regular intervals. *See, e.g.*, 44 Fed. Reg. 55542 (September 26, 1979). On the basis of notice and comment procedures and a public hearing, the Scientific Au-

[1] Subsequent to issuance of the guidelines at issue in this case and to the District Court's decision, Congress amended this provision to designate the Secretary of the Interior as both the Management and Scientific Authorities but again left further implementation in the executive's hands by providing that "[t]he Secretary shall do all things necessary and appropriate to carry out the function[s] of the Management Authority . . . [and] of the Scientific Authority under the Convention." 16 U.S.C. §1573a (b)-(c) (Supp. III 1979).

thority promulgated guidelines describing the minimum biological information necessary to support no-detriment findings for each state:

Minimum Requirements for Biological Information

1. Population trend information *** the method of determination to be a matter of State choice.
2. Information on total harvest of the species.
3. Information on distribution of harvest.
4. Habitat evaluation.

(J.A. 175-218).[2] Under these guidelines, no-detriment findings can be made on the basis of "population trend information" together with the other specified items and without estimates or counts of the actual number of bobcats in each state. The Scientific Authority's decision that valid findings of no detriment may be made in this fashion is supported by an administrative record which included comments submitted in response to the Federal Register notices, testimony at the public hearing, and the "Report of the Working Group on Bobcat, Lynx, and River Otter."

The Working Group was composed of "twelve scientists expert in the biology and management of these or similar species [whose] selection was primarily based on the advice of the American Society of Mammalogists, the Wildlife Society, and members of the ESSA" (J.A. 848). Seven of the members thus selected were from the academic world, four worked with state conservation agencies, and one was an employee of the U.S. Fish and Wildlife Service. As explained by the Group's Chairman:

> [T]he charge of the Working Group was to determine as specifically as possible what biological information and

[2] References in the form "J.A." are to the pages of the joint appendix filed in the court below.

> management programs ensure that harvest of bobcat (*Lynx rufus*), lynx (*Lynx canadensis*), and river otter (*Lutra canadensis*) would not be detrimental to their survival or to the species maintaining their normal roles in their ecosystems.

(J.A. 848). The Group met to deliberate on these issues and prepared a draft report embodying its conclusions:

> That draft was presented publicly on January 25, 1978, to an assembly of representatives of State and private organizations concerned about wildlife [including Defenders of Wildlife]. Each representative was allowed to seek clarification of the report and to criticize it and comment on it. In addition, each organization was given three weeks in which to submit written comments to be considered by the Working Group in preparation of a final report.

(J.A. 848-49). In that final report the Working Group observed that the Bobcat had been added to Appendix II as part of a wholesale inclusion of the entire cat family (*Felidae*) and "without adequate consideration of the available biological information"; pointed out that even those species that are properly listed on that Appendix "by definition are not in danger of extinction"; and recommended basing no-detriment findings on "population trend information" and the other requirements for biological information which the Scientific Authority ultimately promulgated as guidelines (J.A. 852, 855, 857). Nothing in the Working Group's report suggests that estimates or counts of total population numbers are necessary.

In this civil action Defenders asserts that such estimates are required by Article IV of CITES as a prerequisite to no-detriment findings and that the guidelines are accordingly invalid.[3] Named as defendants were the Scientific Authority and a number of other federal agencies and officials. The

[3] The challenge to the guidelines was contained in count II of Defenders' Complaint. The remaining five counts of the Complaint asserted other challenges to actions taken with regard to bobcat by the Scientific Authority and the Fish and Wildlife Service, but those issues are not before this Court.

Association intervened as a defendant to represent the interests of its members, which include the fish and wildlife agencies of each of the fifty states. Those state agencies provide the primary source of protection and management for wildlife in this country, including the bobcat, through restricted hunting and trapping seasons and other limitations on taking, and protection of habitat. The Fur Conservation Institute and a number of individual trappers and fur dealers also intervened as defendants.

A considerable portion of the testimony at trial focused on Defenders' attempt to prove that the Scientific Authority acted arbitrarily and capriciously in determining that the minimum biological information recommended by the Working Group forms an adequate basis for no-detriment findings. Three witnesses with Ph.D's in biology or related fields and extensive, practical experience in wildlife management—Drs. Jahn, Crowe, and Evans—testified in support of the guidelines. Dr. Jahn, who at the time of trial was employed by the Wildlife Management Institute and was President of The Wildlife Society, an organization of some 10,000 individual members in approximately 70 countries who are professionally employed in the biological or related fields of wildlife conservation, testified that population trend information derived from harvest data affords an adequate basis for making no-detriment findings and that "this is the normal process that is used in wildlife ecology and management" of many species, including predators like the bobcat (J.A. 533, 536).

Dr. Crowe was a member of the Working Group and did his doctoral dissertation on bobcat population dynamics in Wyoming (J.A. 399-402). He concurred that it is not necessary to have a population estimate in order to make no-detriment findings for bobcat and went on to explain in detail how he draws an accurate, reliable picture of the status and trend of the bobcat population in Wyoming without making population estimates. (J.A. 411-444).

Finally, Dr. Evans, a professional wildlife manager employed by the New Mexico Game & Fish Department, and holder of a Ph.D in Wildlife Ecology, testified similarly for New Mexico

(Tr. 635-680).[4] These scientists demonstrated that, like scientists in many other fields, they can draw reliable, accurate inferences and conclusions from data which may appear to the uninitiated lawyer, judge or other layman to convey little information.

Defenders supported its claim principally through the testimony of two biologists, Drs. Fitch and Grandy (J.A. 253-397). Although neither witness has practical wildlife management experience, each testified that no-detriment findings for bobcat cannot be made without having independent, reliable estimates or counts, not based on harvest data, of the total number of bobcats in each state (J.A. 270, 315-16). Neither witness, however, offered any suggestion as to how such a census could be made for a species like the bobcat which is furtive, nocturnal and very difficult to spot in the wild.

In deciding this case, the District Court held that CITES is a judicially enforceable part of domestic law on which Defenders could base its challenge to the guidelines but rejected that challenge and accepted the testimony of the expert witnesses supporting the guidelines. For example, of Dr. Crowe, the District Court found the following:

> Dr. Crowe displayed an impressive knowledge of the Bobcat and its habitat in Wyoming. His detailed analysis of harvest data bespeaks sound management policy and adequately supports ESSA's no-detriment finding.

Infra, p. 34a.

On appeal, the court below found as a threshhold matter that Congress incorporated all provisions of CITES into domestic law when, "in Section 8(e) of the Endangered Species Act, Congress implemented the Convention" (*infra*, p. 12a) and that Article IV may therefore be judicially enforced against the executive branch. The court then held that the guidelines are invalid because, in the court's view, Article IV of CITES requires that no-detriment findings be based on estimates of total bobcat population numbers. In explaining its reasons for

[4] References in the form "Tr." are to the pages of the transcript of the trial in the district court.

rejecting the conclusion reached by the Working Group, the Scientific Authority, the expert wildlife managers who testified at trial, and the District Court which presided over that trial, the court made no reference to any portions of the record which supported or challenged the guidelines and, instead, announced its own view:

> We do not see how, without adequate information on total bobcat population and the number to be killed in a particular season, the Scientific Authority can make a valid determination of "no detriment."

Infra, p. 17a.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the proper role of the federal judiciary in two areas critical to the doctrine of separation of powers: (1) interpretation, enforcement and compliance with the international obligations which the United States has assumed through treaties; and (2) review of the decisions made by agencies of the executive branch. The decision below espouses an expansive view of the role the courts are to play in both of these areas, a view which conflicts in principle with prior decisions of this Court and the courts of appeals for other circuits.

I. This Case Raises Important Issues Regarding the Proper Role of the Federal Courts In Implementing Treaties Which Call for Action by the Executive Branch.

Adherence to the propositions established by the Court below will thrust the federal judiciary squarely into the role of supervising implementation of treaties by the executive branch. Because such a decision holds considerable potential for interference in the executive's conduct of foreign policy and detriment to the principle of separation of powers, review by this Court is justified. See, *e.g.*, *Goldwater* v. *Carter*, 444 U.S. 996 (1979).

In considering the proper role for the judiciary in interpreting and implementing treaties, a distinction must be made between those treaty provisions which are directed to, and contemplate action by, the legislative or executive branches of our government and those treaties which, of their own force, declare or establish rights and responsibilities of individuals without the need for action by the legislature or the executive. The latter provisions are "self-executing" and become part of domestic law cognizable by our courts immediately upon entering into force. *Foster* v. *Nielsen*, 27 U.S. (2 Pet.) 253, 314 (1829); *The Head Money Cases* [Edye v. Robertson], 112 U.S. 580, 599 (1884); *Diggs* v. *Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). A provision which is directed to and contemplates action by the legislature or the executive is not self-executing; does not, of its own force, become part of our domestic law; and is not subject to judicial interpretation or enforcement. *Id.* Article IV of CITES, on which the court below rested its decision to invalidate the Scientific Authority's guidelines, is not self-executing because it contemplates an implementing scheme to be elaborated by agencies of the executive branch.[5]

The wisdom of holding that treaty provisions contemplating action by the executive are not, of their own force, part of domestic law is apparent. To hold otherwise would render every decision made by the executive in implementing

[5] The court below assumed, without deciding, that CITES is not self-executing (p. 10a, *infra*). There can, however, be little doubt that this assumption is correct, at least as to Article IV. That Article meets each of the three tests customarily used to determine that a treaty provision is not self-executing. The language of Article IV does not, of its own force, create rights or obligations in individuals, but rather calls upon the signatory parties to take appropriate measures to regulate trade in certain species. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298-99 (3rd Cir. 1979); Restatement (2nd) of Foreign Relations Law §141 (1965). The critical language of Article IV—"not detrimental to the survival of that species"— is the type of nonspecific treaty provision which is held to be executory because its terms do not provide sufficient detail to be judicially enforceable against the executive. Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976). Finally, CITES is an international convention signed by a number of countries which do not recognize any treaties as being self-executing, thus creating a lack of mutuality if CITES were held to be self-executing in this country. United States v. Postal, 589 F.2d 862, 878 (5th Cir. 1979).

such provisions subject to judicial review at the suit of anyone with standing, including citizens of the other nations which are signatories to the treaty. Since a treaty is first and foremost an international obligation of the United States and implementation of such an obligation necessarily entails matters of foreign policy, a reviewing court would find itself supervising the conduct of foreign policy, a subject confided to the executive branch under the separation of powers doctrine. *Goldwater* v. *Carter, supra,* 444 U.S. 996 (1979) (Rehnquist, J., concurring). A conflict between the executive and the courts as to how the former should implement treaty provisions would be particularly embarrassing because in discussions with other nations regarding treaties and their implementation "the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936).

Despite these considerations and the fact that Article IV of CITES is not self-executing, the court below interpreted that Article as requiring reliable population estimates as a prerequisite to making no-detriment findings and relied on that interpretation as the basis for holding the Scientific Authority's guidelines invalid. The court thus rejected the executive's interpretation of Article IV in favor of its own. It declared that it has authority to do so on the theory that Congress has incorporated the entire text of CITES into domestic law by providing in section 8(e) of the Endangered Species Act that the Scientific and Management Authorities are "authorized to do all things assigned to them under the Convention" (p. 67a, *infra*). This decision has the effect of incorporating all executory treaty provisions into domestic law and making executive implementation of such provisions subject to judicial supervision whenever Congress provides the means or authority to carry out the functions such provisions delegate to the executive.

This principle conflicts squarely with the rule stated by the Ninth Circuit in *Hopson* v. *Kreps,* 622 F.2d 1375, 1380 (9th Cir. 1980). When Congress implements an executory treaty it is the implementing legislation and not the treaty itself that becomes domestic law:

> [I]f a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively "law of the land".

622 F.2d at 1380, quoting with approval L. Henkin, Foreign Affairs and the Constitution 157 (1972). Under this principle, the international obligations contained in a treaty are not automatically incorporated into domestic law whenever Congress merely provides the executive the tools necessary to carry out its responsibilities under the Treaty.

Because of the difficulties inherent in judicial supervision of treaty implementation, such direction should not be found absent a clear expression of congressional intention to inject the courts into the treaty implementation process. As this Court has stressed, in matters relating to foreign affairs and treaties only the President can speak for the nation and he must be accorded a high degree of "discretion and freedom from statutory restriction" if "embarrassment—perhaps serious embarrassment—is to be avoided." *United States* v. *Curtiss-Wright Export Corp., supra,* 299 U.S. at 319-20 (1936). In light of these principles, Congressional legislation touching foreign affairs and treaty matters has long accorded the executive branch "wide discretion that otherwise might run afoul of the nondelegation doctrine." *Goldwater* v. *Carter,* 444 U.S. 996 (1979) (Powell, J., concurring, n.1.); *Curtiss-Wright, supra,* 299 U.S. at 322-24. Abandonment of this policy and its replacement with one favoring judicial supervision of treaty implementation should not be found unless Congress has clearly expressed that intention.

A contrary intention is apparent in section 8(e) of the Endangered Species Act, the legislation on which the court below relied for its authority to enforce Article IV against the executive. In that section, Congress was careful merely to "authorize" the Management and Scientific Authorities to carry out their responsibilities under the treaty.[6] As the legislative history makes clear, Congress intended thereby only to provide the executive the "mechanisms for implementation" of CITES. 119 Cong. Rec. 25,670 (1973) (remarks of Senator Tunney). Accord, S. Rep. No. 93-307, 93d Cong., 1st Sess. 5, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2989, 2994; 119 Cong. Rec. 25,676 (1973). Conspicuous is the absence of any suggestion in section 8(e) or the legislative history that Congress intended the federal courts to impose their interpretations of the international obligations the United States undertook in CITES on the executive branch.

Congress thus left it to the executive to elaborate the meaning of Article IV and that Article remains "executory," in the sense of treaty law, pending that elaboration, thereby preserving the "discretion and freedom from statutory restriction" the executive branch needs in treaty matters and foreign affairs. *United States* v. *Curtiss-Wright Export Corp., supra,* 299 U.S. at 320. *Cf., Z&F Assets Realization Corp.* v. *Hull,* 311 U.S. 470, 489 (1940). The judicial role in implementing substantive standards under CITES is limited to ensuring that the executive abides by its own elaboration of the treaty and does not extend to imposing the court's interpretation of international obligations on the executive. See, *e.g., Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 311, 317 (1958)

[6] That Congress in Section 8(e) intentionally limited itself to "authorizing" the Scientific Authority to implement CITES and knowingly refrained from using mandatory language is established by comparing the first and second sentences of that section. In the first sentence Congress "authorized and directed" the President to establish Management and Scientific Authorities, whereas in the second sentence Congress merely "authorized" those Authorities to do those things assigned them under CITES, thus evidencing an intention to refrain from embodying in domestic law a requirement that they carry out the provisions of an international obligation.

(holding unreviewable an agency decision setting canal tolls under treaty which required the tolls to be "just and equitable").

Should the contrary principle stand that all of CITES has been incorporated into domestic law, it will place the executive in a difficult position at the Conference of the Parties held every two years under Article XI of CITES and in other discussions and negotiations among the signatories. At the Conference of the Parties, for example, the parties are required to "review the implementation" of the Convention. CITES, Art. XI(3). In such a review, is the United States delegation obliged to insist that other nations have reliable population estimates before making no-detriment findings under Article IV even though our Scientific Authority does not believe such estimates are necessary? Or, are there, in effect, two sets of books, viz., Article IV as applicable in the United States and Article IV as applicable in all other signatory nations? As other questions arise under CITES and our courts render additional interpretations, is the executive also obliged to advance and advocate those interpretations in discussions and conferences of the parties, even when the executive disagrees with the judicial interpretation?

If the decision below is not reviewed, the same kinds of questions will, of course, arise under other treaties which require executive action and are implemented by Congress in the same way CITES has been. The decision below thus threatens an intolerable degree of judicial entanglement in this nation's dealings with other nations.

II. The Decision Below Propels the Federal Courts Into the Domain Set Aside Exclusively for Agencies of the Executive Branch.

Even if the decisions taken by the Scientific Authority under CITES are assumed for purposes of discussion to be subject to review in the same fashion as are the decisions of other federal agencies acting pursuant to statute, granting the writ is warranted because the decision below conflicts with this Court's repeated warnings against "propelling the Court into the domain which Congress has set aside exclusively for the administrative agency." *Federal Power Commission* v. *Transcontinental Gas Pipeline Corp.*, 423 U.S. 326, 333 (1976),

quoting with approval *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947). To prevent the lower courts from invading that domain, this Court has set specific limits on judicial review of informal agency action. Review must be confined to, and based upon, the record. *Federal Power Commission* v. *Transcontinental Gas Pipeline Corp.*, *supra*, 423 U.S. at 331. The scope of review is governed by the "arbitrary or capricious standard" under which the agency's decision must be upheld so long as it is "rational and based on consideration of the relevant factors." *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). Of course, "[t]he court is not empowered to substitute its judgment for that of the agency" to which the matter has been confided in the first instance. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

The decision below conflicts with the principles stated in each of this Court's decisions cited in the preceding paragraph. After notice and comment procedures, the Scientific Authority promulgated guidelines specifying, *inter alia*, that no-detriment findings for the bobcat can be made on the basis of population trend information, without using estimates of total population numbers. The record supporting this decision assembled during the administrative proceedings and at trial includes the report of the Working Group of twelve expert biologists and wildlife managers and detailed testimony from Drs. Crowe, Jahn and Evans. Also in that record is the testimony of two biologists who, although they lack significant wildlife management experience, were permitted to testify that reliable population estimates are necessary in making no-detriment findings.

In holding the guidelines invalid, the court below ignored this record entirely, made its own, *de novo*, analysis of the information it believed necessary to make no-detriment findings, and substituted its opinion on that subject for the reasoned conclusion of the Scientific Authority. Instead of attempting to evaluate the factual and scientific support for the guidelines found in the record and to determine whether that record provides a rational basis upon which to conclude that population trend information is adequate, the court below simply

conducted its own analysis on the basis of what it apparently believed to be first principles of biology or wildlife management. That analysis begins with an assertion of the court's own opinion about the proper way to make no-detriment findings:

> We do not see how, without adequate information on total bobcat population and the number to be killed in a particular season, the Scientific Authority can make a valid determination of "no detriment."

(p. 17a, *infra*). The court then explains this opinion exclusively with hypothetical examples of its own creation (p. 17a, *infra*), and fails to discuss not only the evidence and expert opinions supporting the guidelines but also the testimony of the only two witnesses who argued against the guidelines (p. 18a, *infra*). Finally, the court announces it conclusion that the guidelines are invalid without paying even "lip service" to the arbitrary and capricious standard or the requirement to test the agency's action against the record.[7] No decision could more clearly conflict with the principles established by this Court in *Federal Power Commission* v. *Transcontinental Gas Pipeline Corp., supra,* 423 U.S. at 331; *Federal Communications Commission* v. *National Citizens Committee for Broadcasting, supra,* 436 U.S. at 803; and *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 416, than does the decision of the court below to substitute its own unsupported opinions on matters of wildlife management for the reasoned decision of the Scientific Authority to which CITES confides those matters in the first instance.

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[7] The portions of the decision below explaining the decision to hold the guidelines invalid is, as explained in the text, devoid of any mention of the facts, opinions and evidence in the record and of any language even suggesting observance of the traditional limits on the scope of review of informal agency action which this Court has established (pp. 16a-19a, *infra*). A puzzling aspect of that opinion, however, is that, in portions discussing other issues not presented to this Court for review, the opinion below evidences adherence to the arbitrary and capricious standard (p. 21a, *infra*) and knowledge of, and reliance upon, the testimony in the record (pp. 22a-23a, *infra*). This situation leaves the decision of the court below to substitute its knowledge of wildlife management for the record and its opinions on the subject for the conclusions of the Scientific Authority without justification.

Even if one were, for purposes of argument, to ignore the explanation given by the court below and to assume that the court actually did attempt to review the Scientific Authority's guidelines in light of the record, the decision below would still reflect a serious invasion into the "domain . . . set aside exclusively for the administrative agency." *Federal Power Commission* v. *Transcontinental Gas Pipeline Corp., supra,* 423 U.S. at 333. The record reflects unanimous support for the guidelines among experts with practical wildlife management experience. The Working Group and Drs. Jahn, Crowe and Evans all recommended basing no-detriment findings on population trend information without requiring population size estimates. The Scientific Authority's decision to adopt this method was rationally based on the record and should have been upheld. *Federal Communications Commission* v. *National Citizens Committee for Broadcasting, supra,* 436 U.S. at 803. Indeed, in light of the lack of wildlife management experience of the only two witnesses to argue that population estimates are necessary, a decision by the Scientific Authority to require such estimates could not have been rationally based on that record. *Id.* Thus, no matter how the decision below is viewed, it represents a serious departure from the proper role of a federal court reviewing administrative action.

III. The Decision Below Will Seriously Impede the Efforts of State and Federal Officials to Administer Effective Wildlife Management Programs.

The principle established below that wildlife management decisions such as a no-detriment finding cannot be made without having "a reliable estimate of the number" of animals in each state (*infra,* p. 19a) is wholly contrary to modern wildlife management as practiced for most species in this country. As Dr. Jahn testified "the normal process in wildlife ecology and management" is to make such decisions using population trend determinations based on harvest data and the age and sex structure information those data provide (J.A. 536). Drs. Crowe and Evans agreed (J.A. 411; Tr. 642-43). Indeed, the scientific literature is replete with studies demonstrating the importance of sex and age classes within wildlife

populations and the projections for the condition of the population that can be made therefrom. *E.g.*, Alexander, The Place of Aging in Wildlife Management, 46 American Scientist 123 (1958); Gilbert, Aging White-Tailed Deer by Annuli in the Cementum of the First Incisor, 30(1) J. Wildlife Management 200 (1966); Gran, Sanderson and Rogers, Age Determination of Raccoons, 34(2) J. Wildlife Management 364 (1970); Leslie, On the Use of Matrices in Certain Population Mathematics, 33 Biometrika 183 (1945). To reject by judicial fiat this well established, proven methodology is to make wildlife management both vastly more expensive and less effective.

First, the decision below will impede the attempts of federal and state agencies to make rational budgetary decisions allocating scarce resources among competing programs. Developing reliable population estimates that are not based on harvest data will consume a disproportionately large segment of the resources available for protection and management of all species. To use one state as an example, in New Mexico making such an estimate would require devoting the full working time of ten state employees for a full year to trapping, tagging and releasing all the bobcats on each of ten widely distributed study areas representing different habitat types so that the bobcat density in each type can be determined and extrapolated to the whole state (Tr. 635-680). A similar effort would have to be made in each state each year by either federal or state wildlife managers. Since the Scientific Authority has to date relied heavily on data provided by the states, the burden most likely will fall on the states. The Court below thus declares that, if bobcat pelts are to enter into international trade, a large part of the monies and manpower available for state wildlife management programs for all of the hundreds of species present throughout a state must be devoted to one species—the bobcat. As this Court has recently pointed out, the courts should be reluctant to impose heavy burdens on the states without clear congressional direction to do so. *Pennhurst State School* v. *Halderman*, U.S. , 49 U.S.L.W. 4363, 4367-4369 (April 20, 1981).

Second, if the decision below were permitted to govern other species and programs, its requirement of reliable popu-

lation estimates will impede the making of a wide range of wildlife management decisions. Where those decisions have in the past been reliably made on the basis of population trend information, they may now have to be deferred until the resources needed to establish unnecessary population estimates are marshalled and such estimates made. Among the first decisions to be affected may be no-detriment findings for other species listed in Appendix II of CITES, such as river otter and lynx. Other programs to which courts may apply the requirement that wildlife management decisions be based on estimates of total population numbers include the Fish and Wildlife Service's determination of the proper hunting season under Section 3 of the Migratory Bird Treaty Act (16 U.S.C. §704); the decision to add a species to the threatened or endangered species lists under Section 4 of the Endangered Species Act (16 U.S.C. §1533); and the requirement of the Endangered Species Act that all federal agencies "insure that their actions will not jeopardize the continued existence of any" species (16 U.S.C. §1536(a)). At a time when the public sector must struggle to find more efficient ways to carry out its responsibilities with fewer available tax dollars, the decision below is a serious step backward.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: May 27, 1981

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2512

DEFENDERS OF WILDLIFE, INC., APPELLANT

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, ET AL.

No. 80-1044

DEFENDERS OF WILDLIFE, INC.

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, ET AL.

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES (INTERVENOR-DEFT.), APPELLANT

No. 80-1083

DEFENDERS OF WILDLIFE, INC.

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, ET AL.

RAYMOND J. DRISCOLL, ET AL. (INTERVENOR-DEFT.), APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 80-1084

DEFENDERS OF WILDLIFE, INC.

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, ET AL.

FUR CONSERVATION INSTITUTE OF AMERICA (INTERVENOR-DEFT.), APPELLANT

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 79-3060)

Argued June 13, 1980

Decided February 3, 1981

Brice M. Clagett with whom *Ellen Bass*, *John B. Douglas III*, *Oscar M. Garibaldi*, and *Lawrence N. Minch* were on the brief, for Defenders of Wildlife, Inc., appellant in No. 79-2512 and cross-appellee in Nos. 80-1044, 80-1083, and 80-1084. *Jeffrey H. Howard* also entered an appearance for Defenders of Wildlife, Inc.

William A. Hutchins with whom *Paul A. Lenzini* was on the brief for International Association of Fish and Wildlife Agencies, appellee in Nos. 79-2512, 80-1083, and 80-1084, and cross-appellant in No. 80-1044.

Stephen S. Boynton, for Conservation Institute of America, et al., appellee in Nos. 79-2512 and 80-1044, and cross-appellant in Nos. 80-1083 and 80-1084.

Dirk D. Snel, Attorney, Department of Justice, with whom *Angus MacBeth*, Deputy Assistant Attorney General, and *Edward J. Shawaker*, Attorney, Department of

Justice, were on the brief, for the Endangered Species Scientific Authority, et al., appellee. *James W. Moorman*, Assistant Attorney General, Department of Justice, also entered an appearance for the Endangered Species Scientific Authority, appellee.

Before: McGOWAN and EDWARDS, *Circuit Judges*, and FRIEDMAN,* *Chief Judge, United States Court of Claims.*

Opinion for the Court filed by *Chief Judge* FRIEDMAN, *United States Court of Claims.*

FRIEDMAN, *Chief Judge*: These appeals challenge actions taken by federal agencies responsible for protecting bobcats by limiting their export, pursuant to the obligations of the United States under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* March 3, 1973, [1976] 27 U.S.T. 1087, T.I.A.S. No. 8249, ___ U.N.T.S. ___ (the Convention). After trial, the district court dismissed the major portions of the complaint (which sought injunctive and declaratory relief) but ruled for the plaintiff on some issues. We hold (1) that parts of the government regulation governing the export of bobcat pelts are invalid, (2) that the district court's dismissal of certain portions of the complaint cannot stand because the court did not make findings explaining the reasons for its action, (3) that the court applied the wrong standard of review in its determinations under other portions of the complaint, and (4) that although the court did not explain or discuss the reasons for dismissing still other portions of the complaint, that action was proper since those portions of the complaint do not state claims upon which relief may be granted. Accordingly, we affirm in part and reverse in part the judgment of the district court and remand the case to that court for further proceedings.

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*Sitting by designation pursuant to 28 U.S.C. § 293(a).

I.

A. *The Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Actions of the United States in Implementing its Obligations Under the Convention.*

1. More than 50 nations (including the United States) agreed upon a treaty (the Convention) to limit international trade in endangered species prior to its becoming effective on July 1, 1975. The Convention contains three appendices listing animals and plants to be protected, and provides for additions and deletions from the appendices. Appendix I covers "all species threatened with extinction." Art. II, para 1. Appendix II, which this case involves, includes "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival." Art. II, para. 2. Appendix III covers species that are subject to regulation by a particular country "for the purpose of preventing or restricting exploitation." Art. II, para. 3. The parties to the treaty agree that they "shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention." Art. II, para. 4.

The bobcat was added to appendix II in February 1977. 50 C.F.R. § 23.23 (1979).[1]

Article IV, para. 1, of the Convention provides that "[a]ll trade in specimens of species included in Appendix II shall be in accordance with the provisions of this Article." Specimens included in appendix II may be exported only pursuant to an export permit, which may be granted only if "a Scientific Authority of the State of export has advised

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[1]This was done by listing in appendix II all species of cats except those in appendix I. One subspecies of bobcat had been listed in appendix I in July 1975. 50 C.F.R. § 23.23 (1979).

that such export will not be detrimental to the survival of that species" and a "Management Authority" of the exporting state "is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora." Art. IV, para. 2. The Scientific Authority "shall monitor both the export permits granted by that State for specimens of species included in Appendix II and the actual exports of such specimens." Art. IV, para. 3. "Whenever a Scientific Authority determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I, the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species." Art. IV, para. 3.

2. In section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. § 1537(e) (1976), Congress directed the President to designate the Scientific and Management Authorities under the Convention. By Executive Order No. 11,911, dated April 13, 1976, 41 Fed. Reg. 15,683, the President established the Endangered Species Scientific Authority (Scientific Authority) as the Scientific Authority under the Convention and designated the Secretary of the Interior as the Management Authority under the Convention.[2] The Secretary delegated his authority as Management Authority to the Fish and Wildlife Service.

In 1977, the Fish and Wildlife Service, as the Management Authority, published regulations governing, *inter*

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[2] In 1979, Congress amended the Endangered Species Act to designate the Secretary of the Interior as both the Management and the Scientific Authority under the Convention. It further provided that the functions of each authority should be carried out by the United States Fish and Wildlife Service. 16 U.S.C. § 1537a (Supp. III 1979). *See* pp. 11-12 *infra*.

alia, the issuance of export permits for species listed in appendix II. These regulations, contained in 50 C.F.R. parts 13 and 23, describe the agency's procedures for dealing with those permits. They state the information required in applying for permits, the criteria for issuance of the permits, and the conditions upon which permits will be issued. 50 C.F.R. subpart 23B.

In 1978, the Scientific Authority published the information it would "need in order to support a finding in favor of export of bobcat . . . taken in 1978-1979." 43 Fed. Reg. 15,098, 15,098. It announced "GUIDELINES FOR ESSA FINDINGS IN FAVOR OF EXPORT." *Id.* The Scientific Authority stated that a Working Group had recommended the following:

> MINIMUM REQUIREMENTS FOR BIOLOGICAL INFORMATION
>
> 1. Population trend information * * * the method of determination to be a matter of State choice.
>
> 2. Information on total harvest[3] of the species.
>
> 3. Information on distribution of harvest.
>
> 4. Habitat evaluation.
>
> As an interim alternative to the above, the ESSA may rely primarily upon past reported harvest. This approach assumes that yield per unit harvest effort will decrease with population decline. Such an assumption of density dependence is intuitively reasonable, but has not been proven. Furthermore, this method by itself does not estimate the level at which the population is maintained. However, data on total harvest and yield per unit effort are relevant and can be very useful in ESSA findings, particularly if harvest is reported accurately, and if data indicate har-

[3]Although the defendants use the word "harvest" to describe the taking of bobcat, we use the more candid term "killing."

> vest effort of individual trappers, hunters and collectors, as well as total numbers engaged in harvest.

Id. 15,099. The Authority stated that in other states where "available population and harvest information is lacking, is very limited, or indicates that past harvest has been detrimental . . . management practices must ensure conservation of these species, consistent with the preceding section." *Id.* It noted that the following "management initiatives" by a state "could weigh heavily in favor of a finding of no detriment by the ESSA:"

> 1. There should be a controlled harvest * * * methods and seasons to be a matter of State choice.
>
> 2. All pelts should be registered and marked.
>
> 3. Harvest level objectives should be determined annually.

Id.

From the outset, the Scientific Authority has evaluated the impact of exports of bobcats (and other species) upon the survival of the species "on a State-by-State assessment of the status of each species," because the Scientific Authority concluded that the "variation among the States in species status indicated that such an individualized approach would best give the ESSA the necessary basis for finding whether export would not be detrimental to the survival of the species." 42 Fed. Reg. 43,730, 43,730 (1977).

In a Notice of Preliminary Findings and Request for Comment, released in 1977, the Scientific Authority stated that "the development of more adequate management and regulation of these species in many States would lead the ESSA to many more findings in favor of international commercial export than is now possible." *Id.* 43,731. The Authority concluded that it was "unable to find that international commercial export of bobcat pelts or products of animals taken from the wild during the 1977-78 season

anywhere in the United States after the date of this notice will not be detrimental to the survival of the species." *Id.* 43,732. Finally, it set out the information that it had regarding the status of the bobcat population (and that of three other animal species) on a state-by-state basis. *Id.* 43,735-64.

Following the publication of the preliminary findings, the states and various groups submitted data and comments. In its final findings concerning the export of bobcats (and other species) for the 1977-78 season, the Scientific Authority indicated that "methods must be established to provide the ESSA with sufficient evidence to make determinations as to whether export of specimens will be detrimental to the survival of that species." 43 Fed. Reg. 11,082, 11,085 (1978). It noted that because the bobcat is elusive, information regarding "population size and trends[,] habitat quality, quantity, and trends, and the true extent of hunting and trapping pressure on that population" "is especially scanty." *Id.* 11,086. The Authority stated that "[b]ecause of the variability in the information available as well as in the management schemes used by different States, the ESSA, for this year, was unable to use a single set of criteria in determining whether a given harvest level would not be 'detrimental to the survival of the species.' " *Id.* On the basis of the information the states had submitted, the Scientific Authority set export quotas for most of the states and the Navajo Nation. *Id.* 11,086-90. Initially, it approved the export of up to 76,000 bobcat pelts from 29 states and the Navajo Nation; subsequently it approved the export of an additional 3,350 pelts from two other states. 43 Fed. Reg. 29,470, 29,471 (1978).

The Scientific Authority has stated that recent informal estimates are that 80-90 percent of the bobcat pelts taken in this country are exported. 44 Fed. Reg. 40,842, 40,843 (1979).

For the 1978–79 season, the Scientific Authority, without setting numerical quotas, approved for most states and the Navajo Nation the export of pelts taken in compliance with state laws and set quotas of 2,000 and 6,000, respectively, for two states. 43 Fed. Reg. 39,306, 39,306–11, 39,316 (1978).

This case involves the export quotas for the 1979–80 season approved by the Scientific Authority. In its advance notice of proposed rule-making for that season, the Scientific Authority said that it would "continue to follow" the guidelines it had published in 1978 for "findings in favor of export" (44 Fed. Reg. 25,384, 25,385 (1979)), which we have set forth at pages 6–7 *supra*. Applying those standards, the Scientific Authority in its final findings, issued in September 1979, approved the export from 34 states and the Navajo Nation of bobcats taken in accordance with state law and set a quota for one state of 8,000. 44 Fed. Reg. 55,540, 55,546–47 (1979) (to be codified in 50 C.F.R. § 23.52).

B. *The Present Case.*

Two months after the Scientific Authority took its final action approving the quotas for the 1979–80 season, the Defenders of Wildlife, Inc. (Defenders) (a nonprofit organization engaged in protecting, conserving, and enhancing wildlife and wild lands) filed a complaint in the United States District Court for the District of Columbia against the Scientific Authority and its members, the Department of the Interior and its Secretary, and the Fish and Wildlife Service and its Director (the federal defendants). The complaint sought a declaratory judgment that the Scientific Authority's guidelines and its findings approving the export of bobcats for 1979–80 and the Fish and Wildlife Service's management regulations implementing the Convention are invalid. The complaint also sought an injunction against the federal defendants' approving the

export of bobcats for 1979-80 and granting any permits therefor. The complaint contained six separate claims for relief, discussed below, each of which challenged the government's regulation of bobcat exports on a different ground.

The district court granted a temporary restraining order barring the export of bobcats. It consolidated the evidentiary hearing on the request for a preliminary injunction with a trial on the merits. At the close of the plaintiff's case, the district court dismissed the complaint with respect to the export of bobcats from 26 states and the Navajo Nation. After the defendants introduced evidence, the court set aside the Scientific Authority's findings that no detriment would result from the export of bobcats taken in five states and in portions of two other states, and granted injunctive relief with respect to those states. It dismissed the complaint with respect to the two remaining states, for which it upheld the no-detriment findings.

II.

There are three threshold questions we must consider before reaching the merits:

A. Intervenor-defendant International Association of Fish and Wildlife Agencies contends that article IV of the Convention did not give the Defenders any judicially enforceable rights. It argues that the Convention is not a self-executing treaty but requires implementation by Congress, and that Congress did not implement it. Although the federal defendants made a similar argument in their brief, at oral argument they receded from that position and conceded that Congress had implemented the Convention.

We find it unnecessary to determine whether the Convention was self-executing, since we conclude that Congress implemented it.

In section 8(e) of the Endangered Species Act of 1973 (16 U.S.C. § 1537(e) (1976)), Congress provided that the agencies it directed the President to designate as the Scientific and Management Authorities "pursuant to the Convention," "shall thereafter be authorized to do all things assigned to them under the Convention, including the issuance of permits and certificates."

The legislative history of that Act confirms that Congress thereby intended to implement the Convention. The Senate Committee Report on the bill stated:

> [O]ne of the purposes of the bill is to take all appropriate steps to implement the Nation's international commitments. To further this intent, the bill provides a means for implementation of the regulations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora if and when that Convention is ratified by the Senate. [The Senate did so in August 1973.] . . . The Committee found that [the regulatory structure agreed to in the Convention] would further the purposes of the [Endangered Species] Act regarding international cooperation. [The bill], therefore, provides the means to establish the appropriate management and scientific authorities . . . .

S. REP. NO. 93-307, 93d Cong., 1st Sess. 5, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2989, 2994.

During the debate on the bill, Senator Tunney explained that it provided "mechanisms for implementation" of the Convention. 119 CONG. REC. 25,670 (1973). Senator Williams stated that the bill provided "the means with which to carry out the provisions of the convention." 119 CONG. REC. 25,676 (1973). *See also* 119 CONG. REC. 30,164 (1973) (remarks of Rep. Goodling); SEN. EXEC. REP. NO. 93-14, 93d Cong., 1st Sess. 3 (1973).

Similarly, when Congress amended the Endangered Species Act in 1979 to designate the Secretary of the Interior as both the Scientific Authority and the Manage-

ment Authority "for purposes of the Convention" (*see* note 2, *supra*), it provided that "[t]he Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority . . . [and] of the Scientific Authority under the Convention." 16 U.S.C. § 1537a(b)–(c) (Supp. III 1979).

Since in section 8(e) of the Endangered Species Act Congress implemented the Convention, the Convention "can be a source of rights enforceable by an individual litigant in a domestic court of law." *People of Saipan* v. *United States Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). *See Diggs* v. *Richardson*, 180 U.S. App. D.C. 376, 379, 555 F.2d 848, 851 (1976).

B. The federal defendants argue that because the Convention provides merely generalized standards for the export of bobcats and Congress has neither implemented the substance of nor particularized those standards, there is no meaningful basis for testing either the Scientific Authority's guidelines for determining permissible export levels or the agency's approval of bobcat exports. For these reasons the federal defendants apparently conclude that there cannot be judicial evaluation of either the guidelines or the findings approving bobcat exports and that therefore the Defenders have not stated any legally cognizable claim.

Section 6 of the Administrative Procedure Act, however, authorizes a court to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976). If any of the guidelines and actions of the Scientific Authority are arbitrary and capricious and not in accordance with law because not in conformity with the Convention, section 6 authorizes us to invalidate them and set them aside. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416

(1971). We cannot conclude, as the federal defendants argue, that in the absence of further congressional implementation, compliance with the Convention is left to the political branch of the government.

C. Although no party argues that the case is moot, we must consider this issue since "[m]ootness is a judicial question because the Court 'is not empowered to decide moot questions or abstract propositions.'" *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

The complaint sought relief against the export of bobcats in 1979–80, the Scientific Authority's guidelines and the Fish and Wildlife Service's regulations implementing the Convention. The mootness issue arises because the export of bobcats for the 1979–80 season is over. We construe the complaint, however, as amplified by the arguments in the Defenders' brief, as not limited to challenging the 1979–80 export determinations, but more broadly as attacking the standards federal agencies apply in approving bobcat exports. As thus interpreted, the case is not moot.

Moreover, even if the challenge were only to the exports for the single season, the case would not be moot. Here the exception to the doctrine of mootness for short-term orders that are "capable of repetition yet evading review" (*Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911)) applies because "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Indeed, in its recently published notice of preliminary findings for the export of bobcats (and other animals) for the 1980–81 season, the Fish and Wildlife Service (which has succeeded the Endangered Species Scientific Authority as the Scientific Authority under the Convention, *see* note 2, *supra*), stated that it "is applying the same criteria and is seeking essentially

the same types of information as requested by the ESSA in developing advice for the 1980–81 season on whether export will not be detrimental to the survival of the species." 45 Fed. Reg. 64,520 (1980). These are the same criteria that the Defenders challenge in this case.

III.

At the close of the plaintiff's case, the district court, in response to a motion to dismiss, dismissed the complaint insofar as it related to the export of bobcats from 26 states and the Navajo Nation. The court made no findings. The only explanation the court gave with respect to that dismissal was the following two sentences from the court's memorandum opinion dealing with the remaining states involved:

> Upon conclusion of plaintiff's case, the Court dismissed the complaint with regard to the Navajo Nation and all states at issue except Wyoming, Oregon, New Mexico, Massachusetts, Wisconsin, North Dakota, South Dakota, Texas and Florida. The Court concluded that plaintiff had failed to show that defendants had acted improperly with regard to the Navajo Nation and the other states at issue herein.

Rule 41(b) of the Federal Rules of Civil Procedure provides that upon the completion of the plaintiff's case in a nonjury trial, in response to a motion to dismiss, the district court may "render judgment against the plaintiff" and, if it does so, "the court shall make findings as provided in Rule 52(a)." The latter rule provides that in all actions tried upon the facts without a jury "the court shall find the facts specially and state separately its conclusions of law." Findings and conclusions may be incorporated in any opinion or memorandum of decision the court may file.

The single sentence quoted above in which the court gave its reasons for dismissing the complaint with respect to the 26 states and the Navajo Nation—that the "plaintiff

had failed to show that defendants had acted improperly with regard to" those entities—does not satisfy the requirements of Rule 41(b). The district court's conclusory statement fails to provide us with an adequate basis upon which we can review its ruling dismissing the major part of the complaint. We do not know what standards the court applied in determining whether the "defendants had acted improperly," whether the dismissal rested upon a failure of factual proof or a lack of any showing that the federal defendants applied the wrong legal standard, or what the court believed to be the proper standards for the Scientific Authority to use in making its determination of no detriment.

Although the complaint challenged both the guidelines of the Scientific Authority and the latter's approval of bobcat exports for the 1979–80 season, even with respect to the states for which it held for the plaintiff, the district court's memorandum discussed only exports, and its order similarly covered only that subject.

Accordingly, the portion of the district court's decision dismissing the complaint insofar as it related to the 26 states and the Navajo Nation must be reversed, and the case remanded to that court to enter findings of fact and conclusions of law that adequately explain the grounds of its decision. It should make these findings and conclusions in accordance with the standards we set forth in the next part of this opinion.

IV.

The Defenders' principal contention, contained in their second claim for relief, is that the Scientific Authority's 1978 guidelines for "Findings in Favor of Export" are arbitrary, capricious, and illegal because "they do not require adequate scientific data to support such findings." In their third claim for relief the Defenders challenge the Scientific Authority's findings approving bobcat exports

for the 1979–80 season as "not supported by adequate scientific data." A common thread links these two claims: the Defenders contend that the Scientific Authority uses a standard for approving bobcat export that is impermissible under the Convention because it does not permit an informed judgment about the impact of the killings upon the species. More specifically, the Defenders claim that unless the total population of bobcats can be estimated with reasonable accuracy and the total number of killings ascertained, it is impossible to determine what effect the killings will have upon the survival of the species.

A. As stated above (pp. 6–7 *supra*), the Scientific Authority's 1978 guidelines announced the following minimum kinds of biological information that permit findings in favor of export: (1) population trend information; (2) information on total number of killings; (3) information on the distribution of killings; and (4) evaluation of the habitat of bobcats. The guidelines further stated that in states where the available data on population and killings were very limited or indicated that past killings had been detrimental to the species, "management practices must ensure continuation of these species" and that state "management initiatives" that "could weigh heavily in favor of a finding of no detriment by the ESSA" were (1) that the killings should be "controlled," with the methods and means therefor to be left to the state to choose, (2) that all pelts should be registered and marked, and (3) that killing level objectives should be determined annually.

These are not adequate bases upon which the Scientific Authority can carry out its obligations to implement the Convention. Under the Convention, export permits for animals listed in appendix II, such as the bobcat, may be granted only if the Scientific Authority advises that the proposed exports "will not be detrimental to the survival of that species." Animals listed in appendix II are those which, although not now threatened with extinction, "may become so unless trade in specimens of such species is

subject to strict regulation in order to avoid utilization incompatible with their survival."

We do not see how, without adequate information on total bobcat population and the number to be killed in a particular season, the Scientific Authority can make a valid determination of "no detriment." For example, the Scientific Authority set a quota for the 1978–79 season of 2,000 bobcats to be killed in Wyoming. If Wyoming had a total population of only 2,500 bobcats, the killing of 2,000 would have a devastating impact upon the survival of the species there. Conversely, if the state had a population of 50,000 animals, the killing of 4 percent of the bobcats probably would not pose a serious threat to survival. Unless the total bobcat population is known, however, it is impossible to predict the effect upon bobcat survival of the killing of a specified number.

It is similarly impossible to make an informed and therefore valid finding of "no detriment" without knowing the total number of animals to be killed. The impact of killing upon the survival of the species depends upon both the population and the extent to which the killing will reduce that population. The proposed killing of a substantial number of bobcats may have only a minimal effect upon the species if the total bobcat population is large. Conversely, the killing of only a small number of animals may have a serious impact if the total number of bobcats is small. The two factors—population and number to be killed—are so interrelated that a valid finding of "no detriment" cannot be made without adequate data about both of them.

The guidelines, however, contemplate and permit no-detriment findings without that information. The "[p]opulation trend information," upon which the Scientific Authority relies, ordinarily is based largely upon the number of past killings and the inference that the total number of bobcats has not been thereby significantly reduced because animals of varying ages and sexes continued to be

killed in similar numbers. These are not sufficient grounds upon which to base a no-detriment finding. Unless the size of the population is known, the effect of any trend toward a change in that population is too conjectural and speculative to permit proper evaluation of its effect upon the species.

In all but two of the states, the Scientific Authority's no-detriment findings for the 1979–80 killings did not even specify the maximum number of bobcats that could be killed. Instead, the Authority merely authorized "pelts legally taken during 1978–79 season." 43 Fed. Reg. 39,309. The fact that the animals were killed in compliance with state laws does not justify the inference that the killing will have no detriment upon the survival of the species. The Convention makes it the obligation of the Scientific Authority, not the states, to make that determination, and the Scientific Authority cannot avoid that obligation by deferring to the limits upon killing the states have imposed.

The Scientific Authority relies upon a state's "management initiative" to protect the species as a critical guideline for finding no detriment in situations where adequate population and killing information is unavailable or where information about past killings raises a serious question about the effect of those killings on the survival of the species. This is not an adequate substitute for the actual facts concerning population and number of killings, which are required before an informed judgment concerning the impact of the killings can be made. If the Scientific Authority does not have that information, it cannot make a valid no-detriment finding. The Scientific Authority cannot substitute for the factual basis necessary to support a no-detriment finding the belief or hope that a state management program somehow will insure the survival of the species.

Any doubt whether the killing of a particular number of bobcats will adversely affect the survival of the species

must be resolved in favor of protecting the animals and not in favor of approving the export of their pelts. Article II, paragraph 2(a), of the Convention recognizes that trade in animals listed in appendix II is to be "subject to strict regulation in order to avoid utilization incompatible with their survival." The various notices and findings of the Scientific Authority that we have described in part I.A.2. of this opinion, however, suggest the opposite attitude. The approach of the Scientific Authority often seemed primarily concerned with an acceptable basis for authorizing bobcat exports despite the absence of convincing factual grounds for making no-detriment findings.

We recognize that, because of the secretive nature of the bobcat's life and behavior, it is difficult to obtain accurate information about the size of the bobcat population. There are indications that techniques for making more accurate population estimates can and may be developed. We do not suggest that the Scientific Authority may base a no-detriment finding only upon some kind of head count of the animals or some other method of measurement that, as a practical matter, would be virtually impossible to make. All the Scientific Authority is required to do is to have a reasonably accurate estimate of the bobcat population before it makes a no-detriment finding. The Scientific Authority has considerable discretion to determine the method by which that estimate may be made and in evaluating its reliability.

We hold, however, that the Scientific Authority cannot make a valid no-detriment finding without (1) a reliable estimate of the number of bobcats and (2) information concerning the number of animals to be killed in the particular season. If that material is not presently available, the Scientific Authority must await its development before it authorizes the export of bobcats.

B. To the extent that the Scientific Authority's no-detriment findings for the 1979-80 season do not reflect

both the bobcat population and the number of animals to be killed, they cannot stand. There is no indication, however, that the district court reviewed the Scientific Authority's findings under that standard.

As we have noted, the court gave no adequate explanation of its reasons for dismissing the complaint at the close of the plaintiff's case with respect to 27 jurisdictions. After the defendants introduced their evidence covering the remaining nine states, the district court set aside the no-detriment findings for five of them and portions of two others, and upheld the findings for the remaining two states. The court made brief findings, each comprising a short paragraph dealing with each of the nine states. None of the district court's findings applied the principles we have set forth in part IV.A. of this opinion, and accordingly they cannot be upheld.

Indeed, some of the findings suggest that instead of evaluating the administrative record to determine whether the no-detriment findings were arbitrary and capricious, the district court made is own findings on the basis of the evidence presented to it. For example, the court gave the following explanation of its conclusion that "defendants have acted within their legitimate authority" in making the no-detriment finding for Wyoming:

> The Court does not reach this conclusion easily in view of the testimony of Mr. Richard Randall, who provided a valuable firsthand account of the decline of bobcats in certain areas of the state. However, the Court concludes that his testimony is outweighed by that of Dr. Crowe of the Planning Section of the Wyoming Game and Fish Department. Dr. Crowe displayed impressive knowledge of the bobcat and its habitat in Wyoming. His detailed analysis of harvest data bespeaks sound management policy and adequately supports ESSA's no-detriment finding. The Court anticipates that Wyoming will continue to gather data regarding the status of the bobcat population within its borders.

This analysis suggests that the court reviewed the no-detriment findings on the basis of its own evaluation of the conflicting testimony at the trial rather than on the administrative record. The district court thus appears to have followed the procedure that the Supreme Court condemned in *Camp* v. *Pitts*, *supra*, as an inappropriate standard of review in a case such as this: "to hold a *de novo* hearing . . . and thereafter determine whether the agency action was 'unwarranted by the facts.' " 411 U.S. at 141. *Cf. Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, 401 U.S. at 415, 420–21. As *Camp* v. *Pitts* explained, if the court concludes that

> there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

411 U.S. at 142–43.

The administrative record in this case is substantial. The parties have stipulated that plaintiff's exhibit 9, which contains the submissions of all of the jurisdictions in support of their applications for bobcat export permits, constitutes that record. These submissions contain a great amount of information about bobcats. On the remand, the district court should review this material, as explained by the evidence at trial, to determine whether the no-detriment findings for each of the 36 jurisdictions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2)(A)." *Camp* v. *Pitts*, *supra*, 411 U.S. at 142.

V.

The Defenders challenge the actions of the federal defendants on several other grounds. Since the district court

did not address these contentions, our normal practice would be to remand for that court to do so. The contentions raise only questions of law, however, the resolution of which does not depend upon or require analysis of the lengthy record. Moreover, the answers to the questions are not difficult. In the circumstances, and to expedite the ultimate conclusion of this litigation, we decide the issues ourselves.

A. In their first claim for relief, the Defenders contend that the Scientific Authority's no-detriment findings were invalid because the Convention required the agency to evaluate the impact of the proposed killings upon subspecies of bobcats in addition to the species as a whole. The Defenders also present the related argument that making the no-detriment findings on a state-by-state basis resulted in inadequate protection for the subspecies, also allegedly in violation of the Convention.

1. For their first argument, the Defenders rely primarily upon article I of the Convention, which defines species as "any species, subspecies, or geographically separate population thereof." The substantive provision of the Convention that governs the making of no-detriment findings by the Scientific Authority, however, is not article I but article IV, which applies to trade in "any specimen of a species included in Appendix II." Only the bobcat, and not any of its subspecies, is listed in appendix II. In contrast, appendix II to the original Convention did list subspecies for other animals. For example, three subspecies are listed for alligators, and three subspecies each for two different species of the cat family. In addition, one subspecies of bobcat is listed in appendix I.

We interpret these provisions of the Convention to authorize the listing of separate subspecies in appendix II but not to require the Scientific Authority to treat separately each subspecies where only the species is listed. The number of subspecies in the animal kingdom is substantial, and the different varieties often are difficult to

identify.[4] It is unlikely that the parties to the Convention intended to require their Scientific Authorities to make findings with respect to every subspecies of every species that is included in the three appendices to the Convention. The more likely explanation of the definition of species is to make it clear that if the parties to the Convention want to accord the protection of the Convention to a separate subspecies by listing it an an appendix, they may do so. The Scientific Authority has interpreted the Convention as not requiring it to make findings for unlisted subspecies. This interpretation, by the agency that implements and applies the Convention, is entitled to substantial weight. *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); *National Indian Youth Council* v. *Bruce*, 485 F.2d 97, 99 (10th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *Shafter* v. *United States*, 273 F. Supp. 152, 157-58 (S.D.N.Y. 1967), *aff'd per curiam*, 400 F.2d 584 (2d Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

2. The Defenders further contend that the Scientific Authority's state-by-state findings do not adequately protect the subspecies because bobcats do not limit themselves to particular states. As stated earlier, from the beginning, the Scientific Authority has made its no-detriment finding on a state-by-state basis because it concluded that the "variation among the States in species status indicated that such an individualized approach would best give the ESSA the necessary basis for finding whether export would not be detrimental to the survival of the species." 42 Fed. Reg. 43,730, 43,730 (1977).

The Defenders' argument assumes, contrary to our holding, that the Scientific Authority is required to

[4]The defendants' expert witness, Dr. Peterson, a zoologist specializing in the ordering of specimens into taxonomic units, including subspecies, testified that bobcat subspecies could be identified only on the basis "of a critical analysis of cranial features," and that it was "impossible" to identify "by sight" a bobcat as a member of a particular subspecies.

evaluate the impact of the killings upon subspecies of bobcats. Moreover, the Defenders have not demonstrated that such an analysis would provide greater protection to the bobcat than the state-by-state basis the Scientific Authority uses if the latter basis reflects the standards we have announced. The states have comprehensive and extensive wildlife protection and conservation programs. We cannot say that the Scientific Authority acted arbitrarily or capriciously, or abused its discretion, in making its detriment determinations state-by-state.

B. The Defenders' three other contentions all relate to the alleged failure of the Management Authority (the Fish and Wildlife Service) properly to perform its duties under the Convention. The Convention requires that before export permits may be granted for species included in appendix II, the Management Authority must be "satisfied that the specimen was not obtained in contravention of the laws of [the exporting] State for the protection of fauna and flora." Article IV, para. 2. The Scientific Authority is required to monitor the "export permits granted" for species included in appendix II "and the actual exports of such specimens." Article IV, para. 3. As noted, the Management Authority has promulgated detailed regulations governing its responsibilities under the Convention.

The Defenders contend that the Scientific Authority did not adequately perform its monitoring duties because it relied upon information supplied by the Management Authority that was inadequate, that the Scientific Authority's no-detriment findings are arbitrary because based upon the false assumption that the Management Authority prevents the export of bobcats killed in violation of state or federal law, and that the Management Authority's regulations are arbitrary and capricious because they do not adequately protect the bobcat.

The Defenders support these contentions primarily upon the basis of the deposition of Richard M. Parsons, the Chief of the Federal Wildlife Permit Office in the Fish and

Wildlife Service, the Management Authority under the Convention. The deposition, however, was never admitted into evidence and therefore is not properly before us.

At the trial the Defenders offered the entire deposition into evidence as plaintiff's exhibit 1. The federal defendants did not object, but suggested that only designated portions should be introduced. The district court agreed, indicating that written "page designations and line designations" should be filed. This was never done, however, and the Clerk's list of exhibits in the case does not include exhibit 1. Some of the exhibits to the deposition were admitted in evidence.

In their opening brief the Defenders admitted that "the deposition of Mr. Parsons was never formally received into evidence," but attempted to excuse this as "a mere technical oversight" and urged that the deposition "was effectively received into evidence." It was incumbent upon plaintiff, however, to insure that the portions of the deposition upon which it relied were admitted into evidence. The plaintiff had ample opportunity to do so, and it cannot now excuse its failure as a "mere technical oversight." For purposes of this appeal the Parsons deposition is not a part of the record before us, and we decline to consider it. *Cf. Drake* v. *General Finance Corp.*, 119 F.2d 588, 589 (5th Cir. 1941); *Steger* v. *Cameron*, 71 U.S. App. D.C. 202, 205, 109 F.2d 347, 350 (1939).

Without the Parsons deposition, there is no basis upon which the Defenders can argue that the Management Authority failed to perform its duties under the Convention. In any event, many of the Defenders' objections to the Management Authority's activities lose their significance as a result of our holding that the Scientific Authority may make valid no-detriment findings only upon the basis of reliable estimates of bobcat population and data on the number of animals to be killed.

Accordingly, we affirm the judgment of the district court insofar as it dismissed the first, fourth, fifth, and sixth claims for relief of the complaint.

VI.

The Defenders challenge certain procedural rulings of the district court as requiring reversal and a new trial.

A. The Defenders contend that the court improperly curtailed their cross-examination of Dr. Brown, the Executive Secretary of the Scientific Authority, a government witness. The facts about this ruling are as follows:

The trial originally had been scheduled to last 3 days. Because plaintiff took nearly 2½ days to present its direct case, the court extended the time limit to mid-afternoon on the fourth day. This was further extended to permit cross-examination of Dr. Brown. Late in the afternoon of the final day, the following colloquy occurred:

> THE COURT: You know, I don't want to cut your cross examination short one little bit, but this case is going to finish today and if you want to make any kind of summations we are not going to sit beyond 6 o'clock.
>
> I think there comes a time when all things must come to an end and I want you to get the picture. At 6 o'clock we are stopping.
>
> MR. HOWARD [Attorney for plaintiff]: Very well, Your Honor. One more question on South Dakota.

Tr. 841. As 6 o'clock neared, the deadline was further discussed:

> MR. HOWARD: Your Honor, I just don't think it's possible to ask even two questions about each of the remaining four states that Dr. Brown has testified to on direct.

THE COURT: I think he's—I am not sure you need it from what he said on direct.

MR. HOWARD: May I have the Court's indulgence just one moment.

THE COURT: Yes.

MR. HOWARD: In view of the Court's 6 o'clock time limit, we will close our cross-examination at this time. Thank you.

MR. BERLIN: I have no redirect, Your Honor.

Tr. 851-52.

The government's direct examination of Dr. Brown filled 64 pages of the transcript (Tr. 739-803), while plaintiff's cross-examination filled 49 pages (Tr. 803-52).

Although Rule 46 of the Federal Rules of Civil Procedure makes "formal exception" unnecessary, it does require "that a party, at the time the ruling or order of the court is made or sought, [make] known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." Where, as here, counsel indicates begrudging acceptance of the court's ruling, there has not been a proper objection, and the ruling cannot be assigned as error on appeal. *Krienke* v. *Illinois Central Railroad*, 249 F.2d 840, 845 (7th Cir. 1957) ("All right."); *Fort Worth & Denver Railway Co.* v. *Roach*, 219 F.2d 351, 352 (5th Cir. 1955) ("Very well, Your Honor.").

In any event, we cannot say that in all the circumstances of this case the district court abused its discretion in bringing the trial to a close by 6 p.m. of the fourth day.

B. The Defenders next object to the district court's refusal to permit them to make an opening argument, and contend that the court's imposition of the 6 p.m. deadline on the last day of trial prevented them from making a closing argument. This was a trial to the court, however,

and the plaintiff had submitted a pretrial brief setting forth its contentions. The district court did not abuse the broad discretion it has to determine whether to permit opening and closing statements. *Cf. United States* v. *DeLoach*, 164 U.S. App. D.C. 116, 120, 504 F.2d 185, 189 (1974), *cert. denied*, 426 U.S. 909 (1976); *Clark Advertising Agency* v. *Tice*, 490 F.2d 834, 836–37 (5th Cir. 1974); *United States* v. *Sawyer*, 143 U.S. App. D.C. 297, 298, 443 F.2d 712, 713 (1971).

C. Finally, the Defenders object to the district court's alleged striking of part of the testimony of Dr. Grandy, one of their witnesses. Dr. Grandy testified on direct examination that no-detriment findings on a state-by-state basis would be inadequate to protect bobcat subspecies. The defendants objected to this statement to the extent that it referred to states for which Dr. Grandy had not studied the data that the states had submitted to the Scientific Authority. The district court apparently sustained the objection, and the Defenders contend that the court subsequently struck those portions of Dr. Grandy's testimony.

It is unclear from the transcript whether the district court did so. If the district court struck portions of Dr. Grandy's testimony, however, the Defenders were not prejudiced by that action in view of our conclusion that the Scientific Authority is not required to make findings with respect to bobcat subspecies, and that even with respect to the bobcat itself, state-by-state findings are sufficient. In any event, we cannot say that there was an abuse of the trial court's discretion to limit the expert's testimony to those states with respect to which the expert was familiar with the underlying data. *See Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962); *Perkins* v. *Volkswagen of America, Inc.*, 596 F.2d 681, 682 (5th Cir. 1979); *N. V. Maatschappij Voor Industriele Waarden* v. *A. O. Smith Corp.*, 590 F.2d 415, 418–19 (2nd Cir. 1978).

CONCLUSION

The guidelines of the Endangered Species Scientific Authority are invalid and are set aside to the extent they authorize findings that the export of bobcats would not be detrimental to the survival of the species that are not based upon reliable estimates of the bobcat population and data showing the total number of bobcats to be killed, in each of the states involved. The judgment of the district court is affirmed insofar as it dismissed the first, fourth, fifth, and sixth claims for relief of the complaint. The judgment of the district court with respect to the second and third claims for relief of the complaint is vacated, and the case is remanded to that court for further proceedings on those claims in accordance with the principles announced in this opinion.

So ordered.

APPENDIX A

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3060

DEFENDERS OF WILDLIFE, INC.
Plaintiff

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al*
Defendants

RAYMOND J. DRISCOLL, *et al*
Defendant-Intervenors

MEMORANDUM OPINION

Introduction

This matter came before the Court for hearing on plaintiff's motion for preliminary injunction on December 3, 4, 5 and 6, 1979. Prior to the hearing, upon due notice to the parties, the Court consolidated the hearing for trial on the merits. Upon consideration of the oral presentations of counsel, the testimony at trial, the evidence submitted and the voluminous record herein, and after balancing the competing interests of the parties, the Court concludes that judgment must be entered in part for plaintiff and in part for defendants.

Plaintiff challenges the action of the Endangered Species Scientific Authority in finding that the export of the pelts of bobcats (Lynx Rufus) killed during the 1979-1980 season will not be detrimental to the survival of that species. Plaintiff also challenges the action of the U.S. Fish and Wildlife Service in issuing export permits allegedly in the absence of an adequate management program ensuring that bobcats would not be taken in violation of state or federal law.

Plaintiff obtained a temporary restraining order from this Court on November 9, 1979. That order enjoined defendants from issuing export permits and from otherwise allowing the export of bobcat pelts taken during the 1979-1980 season from the United States. It also directed or requested that notification of the Court's order be provided to all interested parties. By agreement of counsel, the temporary restraining order was to remain in effect until conclusion of the hearing on the preliminary injunction.

Findings of Fact and Conclusions of Law

Parties

Plaintiff Defenders of Wildlife, is a non-profit tax-exempt corporation committed to the goal of preserving and enhancing the nation's wildlife and wildlands. It brings this action on behalf of itself and its members.

Defendant, Endangered Species Scientific Authority (ESSA), is a federal agency created as the scientific authority of the United States for the purpose of implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a treaty of the United States. Export licenses for bobcat pelts, the subject of this action, are issued in accordance with the requirements of CITES.

Defendant, Department of the Interior, is the management authority for purposes of implementing CITES. This responsibility has been delegated to the defendant, U.S. Fish and Wildlife Service (FWS). The individual principal defendants are officers of the above named defendant agencies. They have the authority and responsibility to make certain determinations under CITES and have promulgated the challenged determinations.

Intervenor defendant, Fur Conservation Institute of America, is a division of Fur Information and Fashion Institute of the American Fur Industry. Intervenor defendant, International Association of Fish and Wildlife Agencies, is an unincorporated

association whose members include the fish and wildlife agencies of the fifty states. Intervenor defendants, Driscoll, et al, are trappers and purveyors of bobcat pelts which are exported in large part.

Background

The United States is a signatory nation to CITES 119 Cong. Rec. 28012.

The bobcat is covered by provisions of CITES and is listed in CITES Appendix II.

The parties to CITES have determined that the bobcat may become threatened with extinction unless trade in bobcats is regulated. CITES Article II ¶2; 44 Fed.Reg. 25385 (April 30, 1979).

Article IV of CITES provides for the regulation of trade of bobcat specimens and requires that a permit be issued prior to any export of bobcat specimens, including pelts.

Article IV ¶2 provides that export permits for bobcat pelts may not be issued until ESSA advises FWS that such export "will not be detrimental to the survival of that species," and FWS is satisfied that specimens are lawfully obtained.

CITES defines "species" to mean "any species, subspecies or geographically separate population thereof." Article I(a).

Article IV ¶3 imposes on ESSA an ongoing responsibility to monitor the export of bobcats for the protection of the species. 43 Fed.Reg. 15098 (April 10, 1978).

ESSA has construed CITES as creating a presumption against trade in bobcat pelts. 43 Fed.Reg. 11085 (March 16, 1978).

FWS has promulgated adequate regulations to implement its responsibilities under CITES as management authority. These regulations require a permit for the export of bobcat pelts and place certain conditions on the issuance of permits. 30 CFR Part 23 (Feb. 22, 1977).

ESSA published a final rulemaking approving bobcat pelt exports from 35 states and the Navajo Nation for the 1979-1980 season. The minimum biological information necessary

for approval was: (1) population trend information, the method of determination to be a matter of state choice; (2) information on total harvest of the species; (3) information on distribution of harvest; (4) habitat evaluation. The minimum management requirements for approval were: (1) there should be a controlled harvest, methods and seasons to be a matter of state choice; (2) all pelts should be registered and marked; (3) harvest level objective should be determined annually. ESSA approved export for some states where not all the guidelines were met rigorously, if it received other information which it considered sufficient. ESSA recognized the mandate to protect subspecies, but determined that its state-by-state approach provided a more precise and responsive mechanism, in part because bobcat subspecies are poorly defined. 44 Fed. Reg. 55540 *et seq.* (Sept. 26, 1979).

The price of bobcat pelts has been rising dramatically in recent years. Nearly 90% of bobcat pelts are sold for export.

Upon conclusion of plaintiff's case, the Court dismissed the complaint with regard to the Navajo Nation and all states at issue except Wyoming, Oregon, New Mexico, Massachusetts, Wisconsin, North Dakota, South Dakota, Texas and Florida. The Court concluded that plaintiff had failed to show that defendants had acted improperly with regard to the Navajo Nation and the other states at issue herein.

The Court has subject matter jurisdiction over this action. 28 U.S.C. § 1331.

Plaintiff has stated a claim upon which relief can be granted.

The term "Role in the ecosystems" appearing as it does in CITES Article IV §3, the provision which directs ESSA to monitor export permits and actual exports for the protection of species listed in Appendix II, has been declared to be scientifically undefinable.

Wyoming

The Court is satisfied that defendants have acted within their legitimate authority. The Court does not reach this

conclusion easily in view of the testimony of Mr. Richard Randall, who provided a valuable firsthand account of the decline of bobcats in certain areas of the state. However, the Court concludes that his testimony is outweighed by that of Dr. Crowe of the Planning Section of the Wyoming Game and Fish Department. Dr. Crowe displayed impressive knowledge of the bobcat and its habitat in Wyoming. His detailed analysis of harvest data bespeaks sound management policy and adequately supports ESSA's no-detriment finding. The Court anticipates that Wyoming will continue to gather data regarding the status of the bobcat population within its borders.

Wisconsin

The Court finds for plaintiff. Trapping pressure is increasing and the harvest is declining throughout much of the state, particularly the northern regions where the bobcat was formerly common. Track count surveys verify the decline. Harvest data indicate that twice as many females as males are being taken.

South Dakota

The Court finds for defendants. Trapping season is permitted only west of the Missouri River, and the season is only one month long. Moreover, the jackrabbit, staple of the bobcat diet, appears to be flourishing. Harvest data indicate that abundant young are being introduced, and that bobcats of up to 9.5 years old remain at large, lending assurance that excessive "pressure" is not present. The Court anticipates that South Dakota will continue to gather data regarding the status of the bobcat population within its borders.

Florida

The Court finds for the plaintiff with regard to Florida. Although the Court appluads Florida's initiation of field research regarding bobcat habitat and population trends, the Court notes that until now very little management attention has been paid to the bobcat, and that much of what little harvest data had been collected has been lost or destroyed. The Court is not satisfied that an appraisal of the bobcats' status in Florida

is sufficient to support a finding of no-detriment has been obtained. There are no bag or possession limits.

New Mexico

The Court finds for plaintff. Presently the state of New Mexico is without authority to manage the bobcat, since it is classified as a predator. The ESSA imposed quota of 6,000 is far in excess of past harvest estimates. The trapping pressure on bobcat populations is not known. There are no bag or possession limits. What recent harvest data the state had in its possession had not been analyzed at the time New Mexico made its submission to ESSA.

North Dakota

The Court finds for plaintiff. Knowledge of the bobcat in North Dakota is minimal. Population densitites are not available, and statewide distribution is imprecisely known. Past harvests are unknown; consequently there are no derivative harvest data. There are no bag or possession limits.

Massachusetts

The Court concludes that ESSA's finding of no-detriment is inadequate notwithstanding the state's harvest quota. Population estimates are tenuous and outdated and based on troublesome assumptions. The most recent age structure analysis of that population is unsatisfactory.

Texas

The Court finds for plaintiff with regard to the high plains ecological area of Texas, and finds for defendant with regard to the remainder of the state. The Court is mindful that the high plains area roughly corresponds to the range of the rare lynx rufus baileyi subspecies in Texas. The baileyi subspecies produces a very valuable pelt and harvest data indicate that it is being taken with decreasing frequency despite dramatically increasing trapping pressure. There are no bag or possession limits. The situation apears differently throughout the rest of the state where harvest data indicate that bobcat were present

in sufficient amounts to justify trapping in the 1979-1980 season. The Court anticipates that Texas will continue to gather data regarding the status of the bobcat population within its borders.

Oregon

The Court finds for plaintiff with regard to the eastern region of Oregon and for the defendant with regard to the western region. The Court notes that the eastern region is inhabited by subspecies pallescens and the western region by subspecies fasciatus. The market value of the rarer pallescens is approximately twice that of the fasciatus, and historically, the trapping pressure has reflected that price differential. At trial, Dr. Brown, Executive Secretary of ESSA, testified that Oregon's population estimate was extremely subjective, and in this matter, the Court finds him credible in light of Oregon's similar admission. The Court therefore concludes that defendants acted improperly with regard to the fragile pallescens. The Court applauds Oregon's present research efforts and anticipates that Oregon will continue to gether data regarding the status of the bobcat within its borders.

JUNE L. GREEN
U.S. District Judge

Dated: December 12, 1979

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3060

DEFENDERS OF WILDLIFE, INC.
Plaintiff

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al*
Defendants

RAYMOND J. DRISCOLL, *et al*
Defendant-Intervenors

ORDER

This matter came before the Court for hearing on plaintiff's motion for preliminary injunction which had been consolidated for trial on the merits on December 3, 4, 5 and 6, 1979. Upon consideration of the oral arguments of counsel, the testimony adduced at trial, the evidence submitted and the entire record herein, for the reasons set forth in the accompanying memorandum opinion, it is by the Court this 12th day of December 1979,

ORDERED that judgment be entered for plaintiff with regard to Wisconsin, Florida, New Mexico, North Dakota, Massachusetts, eastern Oregon and the high plains ecological area of Texas; it is further

ORDERED that defendants are enjoined from issuing export permits and from otherwise allowing the export of bobcat pelts taken during the 1979-1980 season from the above named areas; it is further

ORDERED that defendants notify all state Fish and Game Agencies of the above named states to notify all trappers within their borders wherever reasonable, of this order; it is further

ORDERED that judgment be entered for defendants with regard to the Navajo Nation and the balance of the states at issue herein; and it is further

ORDERED that this action be and hereby is dismissed.

JUNE L. GREEN
U.S. District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2512 September Term, 1980

Civil Action No. 79-3060

DEFENDERS OF WILDLIFE, INC.,
Appellant

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al.*

80-1044

DEFENDERS OF WILDLIFE, INC.

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al.*
INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES (Intervenor-Deft)
Appellant

80-1083

Civil Action No. 79-3060

DEFENDERS OF WILDLIFE, INC.

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al.*,
RAYMOND J. DRISCOLL, *et al.*, (Intervenor-Deft.),
Appellant

80-1084

Civil Action No. 79-3060

DEFENDERS OF WILDLIFE, INC.

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al.*,
FUR CONSERVATION INSTITUTE OF AMERICA (Intervenor-Deft.),
Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2512, et al. September Term, 1980

Before: McGOWAN and EDWARDS, Circuit Judges, and FRIEDMAN*, Chief Judge, United States Court of Claims

JUDGMENT

These cases came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from herein is hereby affirmed in part, vacated in part, and the cases are remanded to the District Court for further proceedings not inconsistent with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

George A. Fisher
Clerk

Date: February 3, 1981
Opinion for the Court filed by Chief Judge Friedman

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* Sitting by designation pursuant to 28 U.S.C.§ 293(a).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2512 September Term, 1980

Civil Action No. 79-3060

DEFENDERS OF WILDLIFE, INC.,
Appellant

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al.*

and consolidated cases

Before: McGowan; Chief Judge, Edwards; Circuit Judge, Friedman*; Chief Judge, United States Court of Claims

ORDER

On consideration of the petition of the International Association of Fish and Wildlife Agencies for rehearing, it is

ORDERED by the Court that the aforesaid petition is denied.

For the Court:

GEORGE A. FISHER, Clerk

By:
ROBERT A. BONNER
Chief Deputy Clerk

Filed: February 26, 1981.

* Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

The Contracting States,

RECOGNIZING that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;

CONSCIOUS of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;

RECOGNIZING that peoples and States are and should be the best protectors of their own wild fauna and flora;

RECOGNIZING, in addition, that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade;

CONVINCED of the urgency of taking appropriate measures to this end;

HAVE AGREED as follows:

ARTICLE I

DEFINITIONS

For the purpose of the present Convention, unless the context otherwise requires:

(a) "Species" means any species, subspecies, or geographically separate population thereof;

(b) "Specimen" means:

(i) any animal or plant, whether alive or dead;

(ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof; and for species included in Appendix

III[1] any readily recognizable part or derivative thereof specified in Appendix III in relation to the species; and

(iii) in the case of a plant: for species included in Appendix I, any readily recognizable part or derivative thereof; and for species included in Appendices II and III, any readily recognizable part or derivative thereof specified in Appendices II and III in relation to the species;

(c) "Trade" means export, re-export, import and introduction from the sea;

(d) "Re-export" means export of any specimen that has previously been imported;

(e) "Introduction from the sea" means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State;

(f) "Scientific Authority" means a national scientific authority designated in accordance with Article IX;

(g) "Management Authority" means a national management authority designated in accordance with Article IX;

(h) "Party" means a State for which the present Convention has entered into force.

ARTICLE II

Fundamental Principles

1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict

[1] See Articles V and XVI. As Appendix III is to be composed of species identified by any party to the Convention rather than by agreement of the parties as is the case for the other Appendices, the Conference which produced the Convention concluded that Appendix III could only be established after the Convention had entered into force and the "parties" were identified and even then it would be subject to nearly continuous revision. As of this printing the Secretariat has not promulgated an Appendix III. [Footnote added by the Department of State.]

regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

2. Appendix II shall include:

(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and

(b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.

3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade.

4. The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.

ARTICLE III

Regulation of Trade in Specimens of Species included in Appendix I

1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix I shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;

(b) a Management Authority of the State of export is satisifed that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;

(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(d) a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

(b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

4. The re-export of any specimen of a species included in Appendix I shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention;

(b) a Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(c) a Management Authority of the State of re-export is satisfied that an import permit has been granted for any living specimen.

5. The introduction from the sea of any specimen of a species included in Appendix I shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;

(b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes.

ARTICLE IV

Regulation of Trade in Specimens of Species included in Appendix II

1. All trade in specimens of species included in Appendix II shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;

(b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and

(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

3. A Scientific Authority in each Party shall monitor both the export permits granted by that State for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a Scientific Authority determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I, the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species.

4. The import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.

5. The re-export of any specimen of a species included in Appendix II shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention; and

(b) a Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

6. The introduction from the sea of any specimen of a species included in Appendix II shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and

(b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment.

7. Certificates referred to in paragraph 6 of this Article may be granted on the advice of a Scientific Authority, in consultation with other national scientific authorities or, when appropriate, international scientific authorities, in respect of periods not exceeding one year for total numbers of specimens to be introduced in such periods.

ARTICLE V

Regulation of Trade in Specimens of Species included in Appendix III

1. All trade in specimens of species included in Appendix III shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix III from any State which has included that species in Appendix III shall require the prior grant and presentation of an export permit. An export permit shall only only be granted when the following conditions have been met:

(a) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and

(b) a Management Authority of the State of export is satisifed that any living specimen will be so prepared and shipped as to minimize the risk or injury, damage to health or cruel treatment.

3. The import of any specimen of a species included in Appendix III shall require, except in circumstances to which paragraph 4 of this Article applies, the prior presentation of a

certificate of origin and, where the import is from a State which has included that species in Appendix III, an export permit.

4. In the case of re-export, a certificate granted by the Management Authority of the State of re-export that the specimen was processed in that State or is being re-exported shall be accepted by the State of import as evidence that the provisions of the present Convention have been complied with in respect of the specimen concerned.

ARTICLE VI

Permits and Certificates

1. Permits and certificates granted under the provisions of Articles III, IV, and V shall be in accordance with the provisions of this Article.

2. An export permit shall contain the information specified in the model set forth in Appendix IV, and may only be used for export within a period of six months from the date on which it was granted.

3. Each permit or certificate shall contain the title of the present Convention, the name and any identifying stamp of the Management Authority granting it and a control number assigned by the Management Authority.

4. Any copies of a permit or certificate issued by a Management Authority shall be clearly marked as copies only and no such copy may be used in place of the original, except to the extent endorsed thereon.

5. A separate permit or certificate shall be required for each consignment of specimens.

6. A Management Authority of the State of import of any specimen shall cancel and retain the export permit or re-export certificate and any corresponding import permit presented in respect of the import of that specimen.

7. Where appropriate and feasible a Management Authority may affix a mark upon any specimen to assist in identifying the specimen. For these purposes "mark" means any indelible imprint, lead seal or other suitable means of identifying a specimen, designed in such a way as to render its imitation by unauthorized persons as difficult as possible.

ARTICLE VII

Exemptions and Other Special Provisions Relating to Trade

1. The provisions of Articles III, IV and V shall not apply to the transit or trans-shipment of specimens through or in the territory of a Party while the specimens remain in Customs control.

2. Where a Management Authority of the State of export or re-export is satisfied that a specimen was acquired before the provisions of the present Convention applied to that specimen, the provisions of Articles III, IV and V shall not apply to that specimen where the Management Authority issues a certificate to that effect.

3. The provisions of Articles III, IV and V shall not apply to specimens that are personal or household effects. This exemption shall not apply where:

(a) in the case of specimens of a species included in Appendix I, they were acquired by the owner outside his State of usual residence, and are being imported into that State; or

(b) in the case of specimens of species included in Appendix II:

(i) they were acquired by the owner outside his State of usual residence and in a State where removal from the wild occurred;

(ii) they are being imported into the owner's State of usual residence; and

(iii) the State where removal from the wild occurred requires the prior grant of export permits before any export of such specimens;

unless a Management Authority is satisfied that the specimens were acquired before the provisions of the present Convention applied to such specimens.

4. Specimens of an animal species included in Appendix I bred in captivity for commercial purposes, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens of species included in Appendix II.

5. Where a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity or any specimen of a plant species was artificially propagated, or is a part of such an animal or plant or was derived therefrom a certificate by that Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Articles III, IV or V.

6. The provisions of Articles III, IV and V shall not apply to the non-commercial loan, donation or exchange between scientists or scientific institutions registered by a Management Authority of their State, of herbarium specimens, other preserved, dried or embedded museum specimens, and live plant material which carry a label issued or approved by a Management Authority.

7. A Management Authority of any State may waive the requirements of Articles III, IV and V and allow the movement without permits or certificates of specimens which form part of a travelling zoo, circus, menagerie, plant exhibition or other travelling exhibition provided that:

(a) the exporter or importer registers full details of such specimens with that Management Authority;

(b) the specimens are in either of the categories specified in paragraphs 2 or 5 of this Article; and

(c) the Management Authority is satisfied that any living specimen will be so transported and cared for as to minimize the risk of injury, damage to health or cruel treatment.

ARTICLE VIII

Measures to be Taken by the Parties

1. The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

(a) to penalize trade in, or possession of, such specimens, or both; and

(b) to provide for the confiscation or return to the State of export of such specimens.

2. In addition to the measures taken under paragraph 1 of this Article, a Party may, when it deems it necessary, provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a specimen traded in violation of the measures taken in the application of the provisions of the present Convention.

3. As far as possible, the Parties shall ensure that specimens shall pass through any formalities required for trade with a minimum of delay. To facilitate such passage, a Party may designate ports of exit and ports of entry at which specimens must be presented for clearance. The Parties shall ensure further that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment.

4. Where a living specimen is confiscated as a result of measures referred to in paragraph 1 of this Article:

(a) the specimen shall be entrusted to a Management Authority of the State of confiscation;

(b) the Management Authority shall, after consultation with the State of export, return the specimen to that State at the

expense of that State, or to a rescue centre or such other place as the Management Authority deems appropriate and consistent with the purposes of the present Convention; and

(c) the Management Authority may obtain the advice of a Scientific Authority, or may, whenever it considers it desirable, consult the Secretariat in order to facilitate the decision under subparagraph (b) of this paragraph, including the choice of a rescue centre or other place.

5. A rescue centre as referred to in paragraph 4 of this Article means an institution designated by a Management Authority to look after the welfare of living specimens, particularly those that have been confiscated.

6. Each Party shall maintain records of trade in specimens of species included in Appendices I, II and III which shall cover:

(a) the names and addresses of exporters and importers; and

(b) the number and type of permits and certificates granted; the States with which such trade occurred; the numbers or quantities and types of specimens, names of species as included in Appendices I, II and III and, where applicable, the size and sex of the specimens in question.

7. Each Party shall prepare periodic reports on its implementation of the present convention and shall transmit to the Secretariat:

(a) an annual report containing a summary of the information specified in sub-paragraph (b) of paragraph 6 of this Article; and

(b) a biannual report on legislative, regulatory and administrative measures taken to enforce the provisions of the present Convention.

8. The information referred to in paragraph 7 of this Article shall be available to the public where this is not inconsistent with the law of the Party concerned.

ARTICLE IX

MANAGEMENT AND SCIENTIFIC AUTHORITIES

1. Each Party shall designate for the purposes of the present Convention:

(a) one or more Management Authorities competent to grant permits or certificates on behalf of that Party; and

(b) one or more Scientific Authorities.

2. A State depositing an instrument of ratification, acceptance, approval or accession shall at that time inform the Depositary Government of the name and address of the Management Authority authorized to communicate with other Parties and with the Secretariat.

3. Any changes in the designations or authorizations under the provisions of this Article shall be communicated by the Party concerned to the Secretariat for transmission to all other Parties.

4. Any Management Authority referred to in paragraph 2 of this Article shall if so requested by the Secretariat or the Management Authority of another Party, communicate to it impression of stamps, seals or other devices used to authenticate permits or certificates.

ARTICLE X

TRADE WITH STATES NOT PARTY TO THE CONVENTION

Where export or re-export is to, or import is from, a State not a party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.

ARTICLE XI

CONFERENCE OF THE PARTIES

1. The Secretariat shall call a meeting of the Conference of the Parties not later than two years after the entry into force of the present Convention.

2. Thereafter the Secretariat shall convene regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one-third of the Parties.

3. At meetings, whether regular or extraordinary, the Parties shall review the implementation of the present Convention and may:

(a) make such provision as may be necessary to enable the Secretariat to carry out its duties;

(b) consider and adopt amendments to Appendices I and II in accordance with Article XV;

(c) review the progress made towards the restoration and conservation of the species included in Appendices I, II and III;

(d) receive and consider any reports presented by the Secretariat or by any Party; and

(e) where appropriate, make recommendations for improving the effectiveness of the present Convention.

4. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 2 of this Article.

5. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

6. The United Nations, its Specialized Agencies and the International Atomic Energy Agency, as well as any State not a Party to the present Convention, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

7. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located. Once admitted, these observers shall have the right to participate but not to vote.

ARTICLE XII

The Secretariat

1. Upon entry into force of the present Convention, a Secretariat shall be provided by the Executive Director of the United Nations Environment Programme. To the extent and in the manner he considers appropriate, he may be assisted by suitable inter-governmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild fauna and flora.

2. The functions of the Secretariat shall be:

(a) to arrange for and service meetings of the Parties;

(b) to perform the functions entrusted to it under the provisions of Articles XV and XVI of the present Convention;

(c) to undertake scientific and technical studies in accordance with programmes authorized by the Conference of the Parties as will contribute to the implementation of the present Convention, including studies concerning standards for appropriate preparation and shipment of living specimens and the means of identifying specimens;

(d) to study the reports of Parties and to request from Parties such further information with respect thereto as it deems necessary to ensure implementation of the present Convention;

(e) to invite the attention of the Parties to any matter pertaining to the aims of the present Convention;

(f) to publish periodically and distribute to the Parties current editions of Appendices I, II and III together with any information which will facilitate identification of specimens of species included in those Appendices.

(g) to prepare annual reports to the Parties on its work and on the implementation of the present Convention and such other reports as meetings of the Parties may request;

(h) to make recommendations for the implementation of the aims and provisions of the present Convention, including the exchange of information of a scientific or technical nature;

(i) to perform any other function as may be entrusted to it by the Parties.

ARTICLE XIII

International Measures

1. When the Secretariat in the light of information received is satisfied that any species included in Appendices I or II is being affected adversely by trade in specimens of that species or that the provisions of the present Convention are not being effectively implemented, it shall communicate such information to the authorized Management Authority of the Party or Parties concerned.

2. When any Party receives a communication as indicated in paragraph 1 of this Article, it shall, as soon as possible, inform the Secretariat of any relevant facts insofar as its laws permit and, where appropriate, propose remedial action. Where the Party considers that an inquiry is desirable, such inquiry may be carried out by one or more persons expressly authorized by the Party.

3. The information provided by the Party or resulting from any inquiry as specified in paragraph 2 of this Article shall be reviewed by the next Conference of the Parties which may make whatever recommendations it deems appropriate.

ARTICLE XIV

Effect on Domestic Legislation and International Conventions

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:

(a) stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or

(b) domestic measures restricting or prohibiting trade, taking possession, or transport of species not included in Appendices I, II or III.

2. The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession, or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.

3. The provisions of the present Convention shall in no way affect the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a union or regional trade agreement establishing or maintaining a common external customs control and removing customs control between the parties thereto insofar as they relate to trade among the States members of that union or agreement.

4. A State party to the present Convention, which is also a party to any other treaty, convention or international agreement which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement.

5. Notwithstanding the provisions of Articles III, IV and V, any export of a specimen taken in accordance with paragraph 4 of this Article shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement in question.

6. Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 c (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

ARTICLE XV

Amendments to Appendices I and II

1. The following provisions shall apply in relation to amendments to Appendices I and II at meetings of the Conference of the Parties:

(a) Any Party may propose an amendment to Appendix I or II for consideration at the next meeting. The text of the proposed amendment shall be communicated to the Secretariat at least 150 days before the meeting. The Secretariat shall

consult the other Parties and interested bodies on the amendment in accordance with the provisions of sub-paragraphs (b) and (c) of paragraph 2 of this Article and shall communicate the response to all Parties not later than 30 days before the meeting.

(b) Amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two-thirds required for adopting an amendment.

(c) Amendments adopted at a meeting shall enter into force 90 days after the meeting for all Parties except those which make a reservation in accordance with paragraph 3 of this Article.

2. The following provisions shall apply in relation to amendments to Appendices I and II between meetings of the Conference of the Parties:

(a) Any Party may propose an amendment to Appendix I or II for consideration between meetings by the postal procedures set forth in this paragraph.

(b) For marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties. It shall also consult inter-governmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring coordination with any conservation measures enforced by such bodies. The Secretariat shall communicate the views expressed and data provided by these bodies and its own findings and recommendations to the Parties as soon as possible.

(c) For species other than marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties, and, as soon as possible thereafter, its own recommendations.

(d) Any Party may, within 60 days of the date on which the Secretariat communicated its recommendations to the Parties under sub-paragraphs (b) or (c) of this paragraph, transmit to the Secretariat any comments on the proposed amendment together with any relevant scientific data and information.

(e) The Secretariat shall communicate the replies received together with its own recommendations to the Parties as soon as possible.

(f) If no objection to the proposed amendment is received by the Secretariat within 30 days of the date the replies and recommendations were communicated under the provisions of sub-paragraph (e) of this paragraph, the amendment shall enter into force 90 days later for all Parties except those which make a reservation in accordance with paragraph 3 of this Article.

(g) If an objection by any Party is received by the Secretariat, the proposed amendment shall be submitted to a postal vote in accordance with the provisions of sub-paragraphs (h), (i) and (j) of this paragraph.

(h) The Secretariat shall notify the Parties that notification of objection has been received.

(i) Unless the Secretariat receives the votes for, against or in abstention from at least one-half of the Parties within 60 days of the date of notification under sub-paragraph (h) of this paragraph, the proposed amendment shall be referred to the next meeting of the Conference for further consideration.

(j) Provided that votes are received from one-half of the Parties, the amendment shall be adopted by a two-thirds majority of Parties casting an affirmative or negative vote.

(k) The Secretariat shall notify all Parties of the result of the vote.

(l) If the proposed amendment is adopted it shall enter into force 90 days after the date of the notification by the Secretariat of its acceptance for all Parties except those which

make a reservation in accordance with paragraph 3 of this Article.

3. During the period of 90 days provided for by sub-paragraph (c) of paragraph 1 or sub-paragraph (1) of paragraph 2 of this Article any Party may by notification in writing to the Depositary Government make a reservation with respect to the amendment. Until such reservation is withdrawn the Party shall be treated as a State not a party to the present Convention with respect to trade in the species concerned.

ARTICLE XVI

Appendix III and Amendments thereto

1. Any party may at any time submit to the Secretariat a list of species which it identifies as being subject to regulation within its jurisdiction for the purpose mentioned in paragraph 3 of Article II. Appendix III shall include the names of the Parties submitting the species for inclusion therein, the scientific names of the species so submitted, and any parts or derivatives of the animals or plants concerned that are specified in relation to the species for the purposes of sub-paragraph (b) of Article I.

2. Each list submitted under the provisions of paragraph 1 of this Article shall be communicated to the Parties by the Secretariat as soon as possible after receiving it. The list shall take effect as part of Appendix III 90 days after the date of such communication. At any time after the communication of such list, any Party may by notification in writing to the Depositary Government enter a reservation with respect to any species or any parts or derivatives, and until such reservation is withdrawn, the State shall be treated as a State not a Party to the present Convention with respect to trade in the species or part or derivative concerned.

3. A Party which has submitted a species for inclusion in Appendix III may withdraw it at any time by notification to the Secretariat which shall communicate the withdrawal to all Parties. The withdrawal shall take effect 30 days after the date of such communication.

4. Any Party submitting a list under the provisions of paragraph 1 of this Article shall submit to the Secretariat a copy of all domestic laws and regulations applicable to the protection of such species, together with any interpretations which the Party may deem appropriate or the Secretariat may request. The Party shall, for as long as the species in question is included in Appendix III, submit any amendments of such laws and regulations or any new interpretations as they are adopted.

ARTICLE XVII

Amendment of the Convention

1. An extraordinary meeting of the Conference of the Parties shall be convened by the Secretariat on the written request of at least one-third of the Parties to consider and adopt amendments to the present Convention. Such amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two-thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Secretariat to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties which have accepted it 60 days after two-thirds of the Parties have deposited an instrument of acceptance of the amendment with the Depositary Government. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

ARTICLE XVIII

Resolution of Disputes

1. Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of the present Convention shall be subject to negotiation between the Parties involved in the dispute.

2. If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision.

ARTICLE XIX

Signature

The present Convention shall be open for signature at Washington until 30th April 1973 and thereafter at Berne until 31st December 1974.

ARTICLE XX

Ratification, Acceptance, Approval

The present Convention shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Government of the Swiss Confederation which shall be the Depositary Government.

ARTICLE XXI

Accession

The present Convention shall be open indefinitely for accession. Instruments of accession shall be deposited with the Depositary Government.

ARTICLE XXII

Entry into Force

1. The present Convention shall enter into force 90 days after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, with the Depositary Government.[1]

2. For each State which ratifies, accepts or approves the present Convention or accedes thereto after the deposit of the tenth instrument of ratification, acceptance, approval or accession, the present Convention shall enter into force 90 days after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

ARTICLE XXIII

Reservations

1. The provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI.

2. Any State may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:

(a) any species included in Appendix I, II or III; or

(b) any parts or derivatives specified in relation to a species included in Appendix III.

3. Until a Party withdraws its reservation entered under the provisions of this Article, it shall be treated as a State not a party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation.

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[1] July 1, 1975. [Footnote added by the Department of State.]

ARTICLE XXIV

DENUNCIATION

Any Party may denounce the present Convention by written notification to the Depositary Government at any time. The denunciation shall take effect twelve months after the Depositary Government has received the notification.

ARTICLE XXV

DEPOSITARY

1. The original of the present Convention, in the Chinese, English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Depositary Government, which shall transmit certified copies thereof to all States that have signed it or deposited instruments of accession to it.

2. The Depositary Government shall inform all signatory and acceding States and the Secretariat of signatures, deposit of instruments of ratification, acceptance, approval or accession, entry into force of the present Convention, amendments thereto, entry and withdrawal of reservations and notifications of denunciation.

3. As soon as the present Convention enters into force, a certified copy thereof shall be transmitted by the Depositary Government to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.[1]

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this third day of March, One Thousand Nine Hundred and Seventy-three.

---

[1] TS 993; 59 Stat. 1052. [Footnote added by the Department of State.]

SECTION 8(e) OF THE ENDANGERED SPECIES ACT OF 1973

(e) Convention Implementation.—The President is authorized and directed to designate appropriate agencies to act as the Management Authority or Authorities and the Scientific Authority or Authorities pursuant to the Convention. The agencies so designated shall thereafter be authorized to do all things assigned to them under the Convention, including the issuance of permits and certificates. The agency designated by the President to communicate with other parties to the Convention and with the Secretariat shall also be empowered, where appropriate, in consultation with the State Department, to act on behalf of and represent the United States in all regards as required by the Convention. The President shall also designate those agencies which shall act on behalf of and represent the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES,
Petitioner,

v.

DEFENDERS OF WILDLIFE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION

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June 1981

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Is a rulemaking by a federal agency, authorized by statute, immune from judicial review merely because the rulemaking involves the application of standards derived from a treaty?

2. Was the court of appeals' application of the standards for judicial review set forth in the Administrative Procedure Act consistent with decisions of this Court?

STATUTORY PROVISIONS INVOLVED

Pertinent to the issues in this action are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. No. 8249, ratified by U.S.

Senate, 119 Cong. Rec. 28012 (1973), section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. § 1537(e) (1976), and section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1976). The Convention and section 8(e) of the Endangered Species Act of 1973 have been reprinted in the petitioner's appendix. Section 10 of the Administrative Procedure Act provides in pertinent parts:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ."

5 U.S.C. § 704.

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

5 U.S.C. § 706(2)(A).

STATEMENT

Respondent Defenders of Wildlife challenged a rulemaking by a federal agency, the Endangered Species Scientific Authority (hereinafter "ESSA"), which would have permitted essentially unlimited export of bobcat pelts during the 1979-80 season. The primary basis for this challenge was that ESSA's approval of export was arbitrary and capricious and not in accordance with law because ESSA did not act in conformity with provisions of the applicable treaty. After review of lengthy trial-court and administrative records, the court of appeals

declared invalid the guidelines ESSA had employed to make its export findings and remanded the case to the district court with instructions to reexamine the rulemaking record.

The treaty and implementing act. — International trade in bobcat pelts, and the export of such pelts from the United States, is regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES" or "the Convention"). Sixty-seven nations, including the United States, have signed this treaty. 46 Fed. Reg. 28192 (1981).

CITES recognizes the "irreplaceable part" played by the bobcat and other listed species in the "natural systems of the earth," and declares that "international cooperation is essential for the protection of [these] species against overexploitation through international trade." CITES, Preamble. It is undisputed in this action that 80 to 90 percent of all bobcats killed in the United States are killed for the export of their pelts. 44 Fed. Reg. 40842, 40843 (1979).

The bobcat is listed in Appendix II of the Convention as a species "which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to *strict regulation* in order to avoid utilization incompatible with their survival . . . ." CITES, Art. II, para. 2(a)(emphasis supplied). Specimens included in Appendix II may be exported only pursuant to an export permit, which may be granted only if "a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species" and a "Management Authority" of the exporting state "is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora." Art. IV, para. 2(b). Whenever a Scientific Authority determines that export of an Appendix II species should be limited in order to "maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level" at which it might become endangered, "the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species." Art. IV, para. 3.

In section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. §1537(e) (1976), Congress directed the President to designate the Scientific and Management Authorities under the Convention. By Executive Order No. 11911, dated April 13, 1976, 41 Fed. Reg. 15683, the President established ESSA as the Scientific Authority under the Convention and designated the Secretary of the Interior as the Management Authority under the Convention.[1] The Secretary delegated his authority as Management Authority to the Fish and Wildlife Service.

The administrative actions. — From the outset, ESSA has conducted annual rulemakings to evaluate the impact of export on survival of the bobcat species and has issued findings of "no detriment" on a state-by-state basis. In 1978, ESSA published a statement of the information it would "need in order to support a finding in favor of export of bobcat . . . taken in 1978-79". 43 Fed. Reg. 15098 (1978). Styled "GUIDELINES FOR ESSA FINDINGS IN FAVOR OF EXPORT," this notice stated the methodology with which all subsequent no-detriment findings have ostensibly been made. *See* 44 Fed. Reg. 55540, 55541 (1979); 45 Fed. Reg. 64520 (1980).

ESSA's guidelines set forth certain "minimum requirements for biological information" in order to make a finding that export will not be detrimental to the survival of the bobcat species:

> "1. Population trend information . . . the method of determination to be a matter of State choice.
>
> 2. Information on total harvest of the species.
>
> 3. Information on distribution of harvest.
>
> 4. Habitat evaluation."

43 Fed. Reg. 15098, 15099 (1978). As an "interim alternative," ESSA's guidelines provide that it may rely on "past

[1] While this case was pending on appeal, Congress amended the Endangered Species Act to designate the Secretary of the Interior as both the Management and the Scientific Authority under the Convention. It further provided that the functions of each authority should be carried out by the United States Fish and Wildlife Service (hereinafter "Fish and Wildlife Service"). 16 U.S.C. § 1537a (Supp. III 1979).

reported harvest." Alternatively, if available population data and harvest information are lacking or are very limited or suggest that past harvest has been detrimental, ESSA's guidelines state that, if a state simply follows certain "management initiatives," this "could weigh heavily in favor of a finding of no detriment by the ESSA." *Id.* These "minimum requirements for a management program" are:

> "1. There should be a controlled harvest . . . methods and seasons to be a matter of State choice.
>
> 2. All pelts should be registered and marked.
>
> 3. Harvest level objectives should be determined annually."

Id. Thus, ESSA's guidelines, while ostensibly requiring minimum biological data, permit no-detriment findings to be made merely on the basis of past reported harvest (kill) data, and in fact promise to dispense with even that formality if a state takes minimal management initiatives.[2]

Applying these highly flexible standards, ESSA repeatedly approved essentially unrestricted export of bobcat despite admittedly scanty information "on population size, population trend, or the impact of commercial trade" on the bobcat.[3] For both the 1978-79 and 1979-80 seasons, every state or Indian nation requesting export authorization from ESSA received approval without a single disapproval or cutback.

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[2] In the 1979-80 rulemaking which is the subject of this action, ESSA approved for unrestricted export states which could not satisfy even its minimum management program requirements. *See* 44 Fed. Reg. 55540, 55541-42, 55544-45 (1979); 44 Fed. Reg. 40842, 40847-49 (1979).

[3] In a letter to the Director of the Fish and Wildlife Service, dated January 4, 1979, William Y. Brown, ESSA's Executive Secretary, wrote concerning the bobcat:

> "Little reliable information of any kind is available on population size, population trend, or the impact of commercial trade. What data we have give cause for some concern for the status of the species. Most research likely to provide useful data is still in an embryonic stage."

J.A. 1460.

The proceedings below. — Two months after ESSA had completed its rulemaking for the 1979-80 season, Defenders filed suit against ESSA, the Fish and Wildlife Service, and others. The complaint stated six claims for relief, each challenging the government's regulation of bobcat exports on a different ground. Defenders requested that ESSA's guidelines, its findings approving export of bobcats taken in the 1979-80 season, and the Fish and Wildlife Service's regulations implementing its management responsibilities under CITES be declared invalid.

The district court granted a temporary restraining order barring the export of bobcats. It consolidated the evidentiary hearing on the request for a preliminary injunction with trial on the merits. At trial, the entire administrative record was introduced as evidence and extensive expert testimony proffered to explain the record and pinpoint deficiencies in both ESSA's data and its methodology as expressed in its guidelines.

The trial court granted defendants' motion to dismiss at the close of plaintiff's case with respect to twenty-six states and the Navajo Nation. No reasons for this dismissal or findings of fact were stated either at the trial or in the court's subsequent memorandum opinion.[4]

After the trial, the court ruled on the remaining nine states. The court held in favor of Defenders as to five states and part of two others. Its opinion contained no mention of five of the complaint's six counts or of its prayer for a declaratory judgment. Although the complaint challenged both ESSA's guidelines and its approval of exports for the 1979-80 season, the district court's opinion and order addressed only exports.

On appeal, the petitioner contended that Article IV of the Convention gives Defenders no judicially enforceable rights. It argued that Article IV is not self-executing and that Congress

[4] As the court of appeals found, this was clear non-compliance with Rule 41(b) of the Federal Rules of Civil Procedure, which requires the district court to state specific findings of fact and conclusions of law in support of its judgment. Appendix to the Petition (hereinafter "P.A.") 14a-15a.

had not implemented it. The federal defendants made a similar argument in their brief, but at oral argument conceded that Congress had implemented the Convention through section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. §1537(e) (1976). P.A. 10a. Reviewing the legislative history of section 8(e), the court found it unnecessary to determine whether the Convention was self-executing because it concluded that Congress had implemented the treaty. *Id.* at 10a-12a.

The court held that ESSA's guidelines were inconsistent with the mandate of CITES. It found that an informed and therefore valid finding that "export will not be detrimental to the survival of" the bobcat species (CITES, Art. IV, para. 2(a)) cannot be made without adequate information on total bobcat population and the number to be killed in a particular season. Yet the guidelines contemplate and permit no-detriment findings without that information. P.A. 17a. Further, the court found they had been applied with an attitude that seemed to abhor the "strict regulation" required by the Convention, Art. II, para. 2(a). "The approach of the Scientific Authority often seemed primarily concerned with an acceptable basis for authorizing bobcat exports despite the absence of convincing factual grounds for making no-detriment findings." P.A. 19a. The court therefore declared ESSA's guidelines invalid, and remanded the proceeding to the district court for a reexamination of the rulemaking record.

On remand, Defenders withdrew its request for an injunction against exports from past seasons. The federal defendants represented that they have begun the administrative process for issuing new export guidelines and that they would authorize no export of bobcats for the 1981-82 season until those guidelines are promulgated. With the consent of all parties, the district court enjoined export of bobcats taken or killed subsequently to July 1, 1981, until new guidelines consistent with the court of appeals decision are promulgated and findings made on the basis of those guidelines. Appendix hereto, 1A-2A.

The federal defendants are not seeking further review by this Court.

REASONS FOR DENYING THE WRIT

Respondent Defenders of Wildlife and a government agency have been in disagreement as to the congruence of the agency's action with the governing statute and treaty. That disagreement has been resolved by the court below, and the government has accepted that result. Petitioner, an intervenor below, suggests that the court below has improperly infringed on the authority of the executive branch and has improperly exercised its power to review agency action. Neither contention warrants further consideration by this Court.

I. The Decision Below Is Fully in Accord with Prior Decisions of This Court Concerning Judicial Interpretation of Treaties.

Petitioner's principal contention is that the rulemakings of ESSA and its successor are immune from judicial review because of the "considerable potential for interference in the executive's conduct of foreign policy and detriment to the principle of separation of powers."[5] Petition 8. The decisions of this Court afford no support for this contention.

To the contrary, this Court's decisions interpreting section 10 of the APA (5 U.S.C. §§701-06) make clear that it creates a basic presumption of reviewability. Section 10 "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano* v. *Sanders*, 430 U.S. 99, 104 (1977). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. at 136, 141 (1967).

Petitioner seeks to support its position by invoking decisions of this Court that concern the political-question doctrine and intertwining its discussion of these cases with the contention that both courts below erred in finding that CITES has been implemented by section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. §1537(e).

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[5] This argument was not made below; hence the decision had no occasion to address it.

The present controversy clearly does not fall within any of the formulations for identifying political questions. *See Baker* v. *Carr*, 369 U.S. 186, 217, 226 (1962). There is no greater separation-of-powers problem in this case than in any other case where courts review administrative action, a function which has been entrusted to them by Congress. Nor have the courts hesitated to interpret and enforce treaties. *See, e.g., Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940); *Asakura* v. *City of Seattle*, 265 U.S. 332 (1924); *People of Saipan* v. *Department of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). Indeed they must, for Article VI of the Constitution makes treaties part of the supreme law of the land.

The decision below does not have the potential for embarrassment to the government abroad to which the Petition alludes. *See* Petition 11.[6] The court of appeals' interpretation of CITES is consistent with the position taken by the United States delegation to the conference that negotiated the treaty. *See* Tr. 76-80. It is also consistent with the interpretation of the treaty to which the Secretary General of the Convention adheres. *See* J.A. 730-33. Moreover, the consequences of the court of appeals decision are entirely domestic: some trappers may be denied export permits unless better data are collected. The executive branch will remain free to take any position it wishes in international negotiations. Obviously the federal government, which has not sought certiorari, does not share petitioner's view that the decision below will embarrass or hinder the conduct of foreign relations.

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[6] There are broad appeals in the Petition to the alleged foreign-relations aspect of this case, quoting dicta from United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). These appeals vastly overstate and obscure the law in this area. As this Court has declared:

> "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case and of the possible consequences of judicial action."

Baker v. Carr, *supra*, 369 U.S. at 211-12 (footnotes omitted).

Nor did the courts below err in finding that Congress had implemented CITES. In section 8(e) of the Endangered Species Act of 1973, Congress provided that the agencies it directed the President to designate as the Scientific and Management Authorities "pursuant to the Convention.... shall thereafter be authorized to do all things assigned to them under the Convention, including the issuance of permits and certificates."[7] The legislative history of the Endangered Species Act makes it abundantly clear that Congress intended to implement Article IV of CITES by legislative incorporation. *See* S. Rep. No. 93-307, 93d Cong., lst Sess. 5 (1973); 119 Cong. Rec. 25670, 25676, 30164 (1973); S. Exec. Rep. No. 93-14, 93d Cong., lst Sess. 3 (1973). The United States has acknowledged, before the other Parties to the Convention, that CITES is implemented by the Endangered Species Act.[8] In the proceedings below, counsel for the government on two separate occasions represented that the Convention has been implemented by section 8(e) of the Endangered Species Act. *See* P.A. 10a; Tr. 5-6, 20.[9]

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[7] The Petition's argument that the court of appeals erred in finding that Congress had implemented CITES by means of section 8(e) makes much of a small difference in wording between its first and second sentences. In the first sentence, the President was "directed and authorized" to establish a Management Authority and a Scientific Authority, while in the second sentence these agencies were simply "authorized" to do all things assigned to them under the Convention. Thus, petitioner contends Congress "intentionally limited itself" and "knowingly refrained from using mandatory language." Petition 12, n.6. What this argument overlooks is that the Convention was not yet in force when this implementing legislation was enacted and, by its own provision, would enter into force only when ten nations had ratified it, an event which did not transpire until 1975. CITES, Art. XXII.

[8] Second Meeting of the Conference of the Parties, San Jose (Costa Rica), 19 to 30 March 1979, Report Presented by the Delegation of the United States of America (Doc. Inf. 2.11) 1 (1979); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Annual Report for 1977 by the United States of America 5 (Nov. 13, 1978).

[9] Nor is there any conflict, as petitioner suggests, between the court's decision and Hopson v. Kreps, 622 F.2d 1375 (1980). That decision reviewed a district court order that had dismissed a suit challenging Commerce Department regulations as inconsistent with a treaty and federal statutes. In the portion of the opinion to which petitioner cites, the court was

(footnote continues)

II. The Decision Below Does Not Conflict with Any Decision of This Court Applying the APA's Standards for Judicial Review.

The decision below is a straightforward application of *Camp* v. *Pitts,* 411 U.S. 138 (1973). Examining the trial court's explanation of its rulings, the court of appeals concluded:

> "This analysis suggests that the court reviewed the no-detriment findings on the basis of its own evaluation of the conflicting testimony at the trial rather than on the administrative record. The district court thus appears to have followed the procedure that the Supreme Court condemned in *Camp* v. *Pitts, supra,* as an inappropriate standard of review in a case such as this: 'to hold a *de novo* hearing . . . and thereafter determine whether the agency action was "unwarranted by the facts." ' 411 U.S. at 141. *Cf. Citizens To Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 415, 420-21."

P.A. 21a. Accordingly, the court remanded the case, directing the trial court to review the administrative record in a manner consistent with *Camp* v. *Pitts* and to determine whether each of the agency's no-detriment findings was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Thus, the court of appeals did not conduct a *de novo* review of the administrative record; it remanded for review of that record by the trial court. Whether ESSA's no-detriment findings were "rational and based on consideration of the relevant factors," *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 803 (1978), is a question it left to

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(footnote continued)

simply saying that "[t]he issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute." *Id.* at 1380. In the case at bar, the court followed this principle and found that the intent of section 8(e) was to implement the Convention so that it "can be a source of rights enforceable by an individual in a domestic court of law." P.A. 12a, *quoting* People of Saipan v. Department of Interior, *supra,* 502 F.2d at 97.

be decided on remand. The court carefully confined its analysis to addressing questions of law and interpreting the relevant statutory and treaty provisions.

The court of appeals also set aside ESSA's guidelines "to the extent they authorize findings that the export of bobcat would not be d[illegible]mental to the survival of the species that are not based upo[illegible]liable estimates of the bobcat population and data showing the total number of bobcats to be killed" in the particular season. P.A. 29a. In so doing, the court construed the Convention's requirement that export be permitted only upon a scientifically supported finding that it will not be detrimental, but it left to the agency "considerable discretion to determine the method by which the estimate may be made and in evaluating its reliability." *Id.* at 19a.

Petitioner's claim that this ruling upon the proper construction of the treaty's language conflicts with principles of judicial review stated in decisions by this Court is without foundation. Interpretation of documents having legal force is quintessentially a judicial function. Section 10(e) of the APA provides in relevant part that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1976).[10] *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), on which petitioner relies, is in no way inconsistent. In that case, the Court found the court of appeals had overstepped the bounds of its reviewing authority by "dictating to the agency the methods, procedures, and time dimension of the needed inquiry without opportunity for further consideration on the basis of the

[10] "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922); *see* Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960). Similarly, where ascertaining meaning requires analysis of legislative history or determination of basic statutory policy, the courts not the agencies are the specialists. *See* NLRB v. Savair Manufacturing Co., 414 U.S. 270, 276-77 (1973); FTC v. Fred Meyer, Inc., 390 U.S. 341, 355-57 (1968); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 542 (1960).

new evidence by the agency." *Id.* at 333. This decision simply has no relevance to the present case.

III. The Decision Below Is of Limited Significance.

Petitioner concludes with predictions of dire consequences for wildlife management programs.[11] That the federal defendants have not sought certiorari itself belies that conclusion. Moreover, the court below left to the agency's discretion the methods for estimating population and evaluating the reliability of such estimates. Since such methods have not yet been announced by the agency, claims as to their costs are clearly premature. Moreover, there is no fundamental right to export bobcat pelts. If the costs of studies to ensure that export will not be detrimental to the species are high, state agencies can forgo requesting export approval or pass the costs of such programs through to the fur industry in the form of permit or tagging fees.

Petitioner's final argument is that the opinion below might have a substantial impact on "a wide range of wildlife management decisions." Petition 17-18. In fact, there are only three other Appendix II species for which OSA makes no-detriment findings through an annual rulemaking: river otter, lynx, and alligator. The court of appeals decision affects only rulemaking concerning these three species.

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[11] Petitioner relies largely on citations to scientific literature never introduced in either the administrative or the judicial proceedings. Respondent could produce its own laundry list of scientific literature demonstrating the extravagance of petitioner's claims. The proper answer, however, is that such material is not before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE

United States District Court

FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, INC.
Plaintiff

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al.*,
Defendants

v.

RAYMOND J. DRISCOLL, *et al.*

and

FUR CONSERVATION INSTITUTE OF AMERICA

and

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES,
Intervenor-Defendants

Civil Action No. 79-3060

FILED
April 23, 1981
James E. Davey,
Clerk

ORDER

On February 3, 1981, the Court of Appeals remanded this case with instructions to make further findings of fact and conclusions of law concerning the legality of exports of bobcats taken during the 1979-1980 season. These findings and conclusions were to be governed by standards for allowing export set forth in the Court's opinion. The guidelines under which federal defendants had made their export findings were declared invalid by the Court for their failure to require both a reliable estimate of bobcat populations and information concerning the number to be killed in a particular season.

At a status hearing held April 15, 1981 in this Court, plaintiff Defenders of Wildlife stated that, while the Court of Appeals' opinion renders previous guidelines invalid, it no longer seeks an injunction prohibiting exports of bobcats from the 1979-1980 season. Nor does it seek to enjoin exports from the succeeding 1980-1981 season. Defenders' present concern is that federal defendants promulgate and properly implement scientific guidelines consistent with the Court of Appeals' decision.

For their part, federal defendants stated that they have begun the administrative process for issuing new export guidelines and that they would authorize no export of bobcats for the 1981-1982 season until those guidelines are promulgated. Federal defendants also indicated that they are considering seeking relief in the Supreme Court, but that absent such relief, they have no objection, in light of the Court of Appeals decision, to an injunction prohibiting 1981-1982 bobcat exports until findings based on the new guidelines have been made.

In view of these developments, the Court hereby orders as follows:

Federal defendants are permanently enjoined from authorizing export of bobcats taken or killed subsequently to July 1, 1981, until they promulgate guidelines consistent with the Court of Appeals decision and make findings on the basis of those guidelines;

Those portions of the complaint concerning export of bobcats taken during previous seasons are dismissed.

SO ORDERED.

April 22, 1981

/s/ JUNE L. GREEN

United States District Judge

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1997

In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL ASSOCIATION OF FISH & WILDLIFE AGENCIES, PETITIONER

v.

DEFENDERS OF WILDLIFE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the determination by the Endangered Species Scientific Authority, in carrying out the United States' obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, that the export of bobcat pelts and parts would not be detrimental to the survival of the bobcat species is subject to judicial review.

2. Whether, if the Scientific Authority's determination is subject to judicial review, the Authority's finding that the export would not be detrimental to the survival of the species was required to be based on a reliable estimate of the bobcat population.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1997

INTERNATIONAL ASSOCIATION OF
FISH & WILDLIFE AGENCIES, PETITIONER

v.

DEFENDERS OF WILDLIFE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is not yet reported. The opinion of the district court (Pet. App. 30a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 39a) was entered on February 3, 1981. The petition for rehearing was denied on February 26, 1981 (Pet. App. 41a). The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 (Pet. App. 42a-66a), obligates the contracting states to control the export of species of wild fauna and flora that are threatened with extinction or that may be so threatened unless trade in specimens of the species is subject to strict regulation. See Art. II, 27 U.S.T. 1092. Appendix I to the Convention lists species that are now threatened with extinction, and Appendix II lists species that may be threatened unless trade in the species is regulated. *Ibid.*

Under Article IV, Paragraph 2, of the Convention (27 U.S.T. 1095), a permit is required for the export from any contracting state of a specimen of a species listed in Appendix II. Such an export permit may be granted only if a Scientific Authority of the contracting state has advised that the export "will not be detrimental to the survival of that species" and a Management Authority responsible for issuing export permits in the contracting state is satisfied that the specimen was not obtained in contravention of the laws of that state for the protection of fauna and flora. Art. IV, ¶¶ 2(a) and (b); Art. IX, ¶ (1)(a) (27 U.S.T. 1095, 1103).

b. By resolution of August 3, 1973, the Senate gave its advice and consent to ratification of the Convention, and the President ratified the Convention on behalf of the United States on September 13, 1973 (27 U.S.T. 1089).[1] On December 28, 1973, the Endangered Species Act of 1973 became law. Pub. L. No. 93-205, 87 Stat. 884, 16 U.S.C. 1531 *et seq.*

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[1] The Convention entered into force on July 1, 1975. Art. XXII, ¶ 1, 27 U.S.T. 1115 & n.1.

Portions of that Act were intended to implement the Convention. In particular, Section 8(e) of the Endangered Species Act (16 U.S.C. 1537(e)) provided [2] in pertinent part:

> The President is authorized and directed to designate appropriate agencies to act as the Management Authority or Authorities and the Scientific Authority or Authorities pursuant to the Convention. The agencies so designated shall thereafter be authorized to do all things assigned to them under the Convention, including the issuance of permits and certificates.[3]

Pursuant to Section 8(e) and Article IX of the Convention, the President designated the Secretary of the Interior as the United States' Management Authority and established the Endangered Species Scientific Authority (ESSA) to act as the United States' Scientific Authority for purposes of the Convention. See Exec. Order No. 11911, 41 Fed. Reg. 15683 (1976). ESSA was composed of "scientifically qualified" representatives of the Departments of Interior, Agriculture, Commerce, and HEW and representatives of the National Science Foundation, the Council on Environmental Quality, and the Smithsonian Institution.

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[2] Section 8(e) has since been repealed by Section 5(4) of the Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1228, 16 U.S.C. (Supp. III) 1537(e), and Congress has since directed the Secretary of the Interior to act as both the Management Authority and the Scientific Authority for purposes of the Convention. See page 4, *infra*.

[3] In addition, Section 9(c) of the Act, which is still in effect (16 U.S.C. 1538(c)), makes it unlawful for any person subject to the jurisdiction of the United States to engage in trade in specimens contrary to the provisions of the Convention, and Sections 11(a) and (b) of the Act (16 U.S.C. 1540(a) and (b)) provide civil and criminal sanctions for violations of this prohibition.

Exec. Order No. 11911, Section 3(b), 41 Fed. Reg. 15683 (1976). Although members of ESSA are among the named defendants in the instant suit, Congress has since abolished ESSA and directed the Secretary of the Interior to act as both the Scientific Authority and the Management Authority for purposes of the Convention. See 16 U.S.C. (Supp. III) 1537a(a)-(c), as added by the Act of Dec. 28, 1979, Pub. L. No. 96-159, Section 6(a)(1), 93 Stat. 1228.

2. Because the entire cat family (*Felidae*) has been listed in Appendix II of the Convention (27 U.S.T. 1135), the export of bobcat parts or pelts from the United States is prohibited absent a finding by the Scientific Authority for the United States—in this case, ESSA—that the export "will not be detrimental to the survival" of the bobcat species. Art. IV, ¶ 2(a) (27 U.S.T. 1095).[4] Since 1978, the Scientific Authority (ESSA or, subsequently, the Secretary) has made its "no detriment" findings for bobcat exports annually, before the start of the hunting and trapping seasons set by most states. As the court of appeals noted with approval (Pet. App. 7a, 23a-24a), the Scientific Authority has based its "no detriment" findings on a state-by-state assessment of the status of bobcats. Depending upon the distribution

[4] The Convention, as implemented domestically by the Endangered Species Act, stands as the sole conservation provision for bobcats at the federal level. The bobcat is not listed as an endangered or threatened species pursuant to Section 4 of the Endangered Species Act, 16 U.S.C. 1533, and no other Act of Congress of general application regulates the hunting, trapping, or conservation of bobcats. To the extent that the taking of bobcats is regulated in the United States independently of the Convention, this is accomplished, pursuant to state law, by the wildlife management agencies of the several states.

of bobcats, therefore, the export from the United States of bobcats killed in one state might be limited or prohibited under the Convention, as implemented, while export of bobcats killed in other states might be permitted.

On April 10, 1978, ESSA published guidelines describing generally the data that should be submitted by the states and others to assist ESSA in making its export determinations for the 1978-1979 season. 43 Fed. Reg. 15097. These export determinations were made later in 1978. Pet. App. 9a. The following year, ESSA announced that it would follow the 1978 guidelines in making its findings for the export of bobcats to be taken during the 1979-1980 season. 44 Fed. Reg. 40841 (1979).

On September 26, 1979, ESSA published its findings that the export of bobcats killed during the 1979-1980 season in 34 states and the Navajo Indian Nation would "not be detrimental to the survival of the species" and to the survival of similar felid species included in the Convention's appendices. 44 Fed. Reg. 55539, 55546-55547. For the 35th state, New Mexico, an export quota of 6,000 bobcat pelts was imposed. *Id.* at 55547.

3. a. On November 9, 1979, respondent Defenders of Wildlife filed suit against the federal respondents, in their capacities as the Management Authority under the Convention and, in the case of the officials of ESSA, in their then-capacities as the Scientific Authority under the Convention. Defenders of Wildlife contended that ESSA's "no detriment" findings for the export of bobcat taken during the 1979-1980 season and the 1978 guidelines on which these findings were based were in violation of the Convention. Defenders sought a preliminary and permanent injunction against the export of bobcats killed in any

state during the 1979-1980 season (Pet. App. 30a-31a).[5]

On December 12, 1979, the district court issued its memorandum opinion and judgment (Pet. App. 30a-38a).[6] The district court did not set aside ESSA's 1978 guidelines. The court did, however, prohibit the federal respondents from permitting the export of bobcat parts and pelts taken during the 1979-1980 season in Wisconsin, Florida, New Mexico, North Dakota, Massachusetts, eastern Oregon, and the high plains ecological area of Texas, on the ground that the data submitted to ESSA regarding the status and distribution of bobcats in these states or parts of states were inadequate or that the state bobcat management program was inadequate (Pet. App. 34a-36a). The district court denied all other relief and dismissed the remainder of the case, thereby permitting bobcat exports from the remaining states.

b. On the cross-appeals of the non-federal parties, the court of appeals invalidated the 1978 guidelines to the extent that they permitted ESSA to make a

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[5] Defenders also challenged the export control regulations (50 C.F.R. Part 23) issued by the Fish and Wildlife Service of the Interior Department, acting as the Management Authority under the Convention, and further sought a declaratory judgment that the Management Authority was failing to perform certain duties under the Convention. The district court rejected this challenge (Pet. App. 32a), and the court of appeals affirmed (Pet. App. 24a-26a). This issue is not presented in the petition in the instant case.

[6] The district court determined (Pet. App. 33a) that it had jurisdiction of the case under 28 U.S.C. 1331. In our view, however, the "citizen suit" provision in Section 11(g) of the Endangered Species Act, 16 U.S.C. 1540(g), provides the exclusive jurisdictional base for this suit. Cf. *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, No. 79-1711 (June 25, 1981), slip op. 11-16.

determination that the export of bobcats would "not be detrimental to the survival of the species" based on the impact the projected kill of bobcats in a particular state would have on the *trend* in the bobcat population of that state, rather than its impact on the estimated *total population* of bobcats in the state. The court of appeals rejected the use of population trend information as "too conjectural and speculative" (Pet. App. 18a).[7] Accordingly, the court of appeals instructed the district court, on remand, to review ESSA's administrative record for the 1979-1980 bobcat season to determine whether ESSA's "no-detriment" findings for the 35 states and the

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[7] Population trend information indicates generally a population's present and probable future increase, decrease, and distribution without reference to the total numbers of that population. Population trend information is one item listed in the 1978 guidelines among the "Minimum Requirements for Biological Information" to be submitted by a state in order for ESSA to make a "no detriment" finding with respect to bobcats taken in that state. 43 Fed. Reg. 15099 (1978). Other information requested pertained to total harvest and distribution of the species, as well as habitat evaluation. *Ibid.*

These "Minimum Requirements" were accompanied by the following explanation of the use of population trend information (43 Fed. Reg. 15099 (1978); emphasis added):

> As one alternative to evaluating impact of harvest by comparing harvest level with population *size*, * * * ESSA may rely to some extent upon analysis of population *age structure*. Given several assumptions, age structure permits estimation of recruitment and loss in a population, *indicating whether the population is increasing, decreasing, or stable.* The results of this analysis can then be related to harvest (cf. Tabor and Wight, 1977, J. Wildl. Mgmt., 41: 692). Such analyses would be useful if done annually, particularly if coupled with habitat evaluation and with comparison of current density with density at carrying capacity.

Navajo Nation were supported by data showing bobcat population estimates and the number of bobcats to be killed (Pet. App. 19a-21a).

c. On remand, respondent Defenders of Wildlife abandoned its challenge to the export of bobcats taken during the 1979-1980 season and other past seasons. As to future years, the district court entered a permanent injunction prohibiting the federal respondents from permitting the export of bobcats taken after July 1, 1981, until the responsible federal agencies issued new guidelines consistent with the court of appeals' decision. See Defenders of Wildlife Br. in Opp. 1A-2A.

On May 26, 1981, the Fish and Wildlife Service of the Department of the Interior published a notice containing the additional criteria upon which it intended to rely in making "no detriment" determinations for the export of bobcats taken during the 1981-1982 season in the several states. 46 Fed. Reg. 28192-28195. In accordance with the decision of the court of appeals in the instant case, the Service requested the states to furnish an estimate of the bobcat population within their borders, as well as other information. *Id.* at 28193-28194. The information requested from the states was to be submitted by July 1, 1981. *Id.* at 28195. The Fish and Wildlife Service is now reviewing the submissions by the states.

ARGUMENT

Unlike petitioner, we do not argue in the circumstances of this case that the actions of the federal respondents are altogether immune from judicial scrutiny merely because they were taken to implement the United States' obligations under an international convention. We do, however, agree with petitioner

that the court of appeals erred in substituting its judgment for that of the responsible federal officials regarding the appropriate means by which to determine whether the export of bobcat parts and pelts will be detrimental to the survival of the species. Although we believe that the court of appeals erred in the latter regard, we are unable to conclude that further review is necessary at this time. It is possible that the population data submitted by the states in response to the Interior Department's May 26, 1981 notice will include (or form the basis for the Department to make) reliable estimates of the bobcat population in the respective states, thereby allowing the Interior Department to permit the export of bobcat parts and pelts in a manner that is consistent with the court of appeals' decision. This Court may wish to wait until the Department of the Interior has reviewed and made findings on the basis of the new data, and until the lower courts have had an opportunity to evaluate any such findings, before deciding whether review of the legal issues presented here is warranted.

1. Petitioner argues (Pet. 8-13) that the Convention on International Trade in Endangered Species of Wild Fauna and Flora cannot form the basis for the assertion of rights in domestic courts because the Convention "contemplates an implementing scheme to be elaborated by agencies of the executive branch" (Pet. 9) and is therefore not "self-executing" (*ibid.*). We agree with petitioner (Pet. 9 n.5) that the Convention is not self-executing in the sense that, standing alone, it is the source of rights that may be enforced by litigants in domestic courts. In this respect, the Convention, even after the Senate gave its advice and consent to ratification of the Convention, is like a contract that "the legislature must execute * * * before it can become a rule for the court" (*Foster* v.

Nielson, 27 U.S. (2 Pet.) 253, 314 (1829)). But here Congress *has* implemented the Convention through legislation—the Endangered Species Act—and that Act reasonably may be read to provide a basis for judicial review, within narrow confines, of the Executive's actions in granting or denying an export permit.

As codified, the citizen suit section of the Endangered Species Act—which, in our view, provides the sole basis of jurisdiction in the present case (see note 6, *supra*)—authorizes any person to commence a civil action "to enjoin any person, *including the United States and any other governmental instrumentality or agency* * * * who is alleged to be in violation of any provision of this chapter * * *." 16 U.S.C. 1540(g)(1)(A) (emphasis added). Section 8(e) of the Act, as in effect when this case arose, provided that "[t]he President is authorized and directed to designate agencies" to act as the Scientific and Management Authorities under the Convention and that these agencies "shall thereafter be authorized to do all things assigned to them under the Convention, including the issuance of permits and certificates." 16 U.S.C. 1537(e). If the agencies designated by the President failed to perform the permit-related functions specifically assigned to them under the Convention and Section 8(e) of the Endangered Species Act, these agencies would appear to have been "in violation" of Section 8(e) and, therefore, to be subject to suit under 16 U.S.C. 1540(g)(1)(A). Thus, we acknowledge that the language of the Endangered Species Act seems to afford a right of judicial review in a case such as this.

As the court of appeals observed, moreover, the legislative history of the Endangered Species Act "confirms that Congress thereby intended to implement the Convention" (Pet. App. 11a). The Senate

report on the 1973 Act states, for example, that the Act "provides a means for implementation of the regulations of the Convention * * * [and] the means to establish the appropriate management and scientific authorities" (S. Rep. No. 93-307, 93d Cong., 1st Sess. 5-6 (1973)).

The 1979 amendments to the Act similarly direct the Executive to implement the Convention. Subsections (b) and (c) of Section 8A of the Act, added in 1979, provide that the Secretary of the Interior "shall do all things necessary and appropriate to carry out the functions of the Management Authority * * * [and] of the Scientific Authority under the Convention." 16 U.S.C. (Supp. III) 1537a(b) and (c). The conference report on the 1979 amendments describes Section 8A as a means to "facilitate the coordinated implementation of the * * * Convention" (H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 17 (1979)). The same committee, in discussing the requirement in Section 8A(d)(7), 16 U.S.C. (Supp. III) 1537a(d)(7), that certain decisions of the Scientific Authority be published in the Federal Register, stated that "[t]he Secretary should provide an opportunity for public comment on all Management Authority and Scientific Authority decisions" (H.R. Conf. Rep. No. 96-697, *supra*, at 18). This passage reasonably may be read to reflect an understanding that the domestic agencies charged with implementing the Convention would do so within a procedural framework similar, if not identical, to the rulemaking procedures described in the Administrative Procedure Act, 5 U.S.C. 553. If so, a presumption in favor of judicial review of agency action, similar to that under the APA,[8] reasonably may be thought to apply to the

[8] See, *e.g.*, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

Executive's issuance or denial of permits under the Convention, in order to determine whether such decisions are arbitrary, capricious, abuses of discretion, or not in accordance with relevant law. Compare 5 U.S.C. 706(2)(A).

In view of this background, we do not join petitioner in its submission that the Executive's decisions granting or denying permits under the Convention, and the "no detriment" findings on which these decisions must be based, are wholly immune from judicial review.

2. However, we agree with petitioner, largely for the reasons it advances (Pet. 13-16), that the court of appeals erred in concluding that the federal respondents could not make a valid "no detriment" finding without "a reliable estimate of the number of bobcats" in each state (Pet. App. 19a). Article IV, Paragraph 2, of the Convention, which requires each party's Scientific Authority to make a "no detriment" finding before an Appendix II species may be exported, does not on its face mandate any particular procedure or methodology to be followed in making such a finding. Nor does the Endangered Species Act. Thus, both the Convention and the Act would appear to vest considerable discretion in the Scientific Authority in carrying out its functions. Cf. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 317-319 (1958).

The court of appeals did not explain what abuse of agency discretion it found when it invalidated ESSA's 1978 guidelines. Rather, the court of appeals seems to have reached its conclusion as a matter of abstract "logic," relying solely on a bare assertion of its lack of understanding as to "how, without adequate information on total bobcat population and the number to be killed in a particular season, the Scientific Authority can make a valid deter-

mination of 'no detriment' " (Pet. App. 17a). In fact, although the court of appeals did not acknowledge the point, the 1978 guidelines themselves furnish such an explanation: an evaluation of the age of the specimens taken in successive years can disclose whether the population as a whole is increasing, decreasing, or stable. 43 Fed. Reg. 15099 (1978); see note 7, *supra*. Moreover, the administrative record and expert trial testimony demonstrate that informed "no detriment" findings, as well as other wildlife management decisions, need not be based on estimates of the *actual* population of a species, but may instead be based on evidence of population trends derived from surveys and other indirect indices showing increase, decrease, and distribution of a species (see Pet. 6-7; J.A. 411, 474-475, 534-536, 543).[9] Where the administrative record, as amplified by trial testimony, demonstrates in this fashion that the agency's decision has a "rational basis" in scientific practice, a federal court may not set aside the decision under the "arbitrary and capricious" standard of review. *FCC* v. *National Citizens Commission for Broadcasting*, 436 U.S. 775, 802-803, 808-809, 815 (1978). Thus, the court of appeals simply has substituted its judgment for that of the expert agency—a result foreclosed by this Court's past decisions. *Id.* at 803, citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 413-416 (1971).

3. Although we believe the court of appeals erred, we have not requested the Court to review the decision below at this time. The court of appeals permitted the Scientific Authority for the United States

[9] "J.A." refers to the Joint Appendix in the court of appeals. For example, an expert for the federal respondents testified that "this is the normal process that is used in wildlife ecology and management" (J.A. 536).

—now the Secretary of the Interior—a broad discretion in designing a methodology for developing the population estimates the court found to be necessary. The court stated (Pet. App. 19a):

> We recognize that, because of the secretive nature of the bobcat's life and behavior, it is difficult to obtain accurate information about the size of the bobcat population. There are indications that techniques for making more accurate population estimates can and may be developed. We do not suggest that the Scientific Authority may base a no-detriment finding only upon some kind of head count of the animals or some other method of measurement that, as a practical matter, would be virtually impossible to make. All the Scientific Authority is required to do is to have a reasonably accurate estimate of the bobcat population before it makes a no-detriment finding. The Scientific Authority has considerable discretion to determine the method by which that estimate may be made and in evaluating its reliability.

In response to the court's flexible mandate, the Fish and Wildlife Service of the Department of the Interior has issued new guidelines in preparation for the Department's review of data submitted by the states for the forthcoming 1981-1982 bobcat season. In these new guidelines, the list in the 1978 guidelines of biological information that must be submitted by a state in order for the Service to make a "no detriment" finding for that state (see note 7, *supra*), has been expanded to include (46 Fed. Reg. 28193 (1981)):

> a. An estimate of the size of the statewide population, including a description of: (i) how it is calculated, with an indication of the geo-

> graphic areas where data used in the calculations were gathered, (ii) how it accommodates differences in abundance over the range of habitat occupied by the species, and (iii) the confidence limits on the estimate.[10]

The list of attributes a state management program must have also has been expanded to include (46 Fed. Reg. 28194 (1981)):

> a. Harvest level objective for the 1981-82 season (anticipated total statewide harvest of the species). Please describe: (i) how this figure is derived, and (ii) how biological information is used in setting the harvest level objective.
>
> b. A description of methods used to insure that the actual harvest will not substantially exceed the harvest level objective.

These provisions were intended to meet the requirements imposed by the court of appeals (*ibid.*). A number of states have submitted material in response to these latest guidelines, and the Department of the Interior is now reviewing the states' submissions to determine whether they will form the basis for reliable estimates of the bobcat population in the respective states.

Given these recent amendments of the governing regulatory provisions, the impact of the court of appeals' decision on the federal respondents' administration of the Convention necessarily is speculative at the present time. If the Fish and Wildlife Service is able to make "no detriment" findings for some or

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[10] In addition, the new guidelines request the states to furnish information about research on the distribution, abundance, and general condition of the bobcat, as well as an assessment of long-term population trends and the relationship of these trends to habitat condition, management practices, harvesting pressures, and other factors. 46 Fed. Reg. 28193-28194 (1981).

all of the states on the basis of information furnished under the revised guidelines, respondent Defenders of Wildlife may seek judicial review of the amended guidelines and the Service's findings under them. On the other hand, if the Service determines that it cannot make "no detriment" findings for the export of bobcats taken in some or all states under the amended guidelines—*e.g.*, because the data submitted by the states do not form the basis for making a "reliable" estimate of bobcat population—petitioner may seek judicial review of that determination on behalf of the wildlife management agencies in the affected states. The Court therefore may wish to afford the lower courts an opportunity to consider the new guidelines and any findings made under them before granting review of the legal issues presented in the petition.

Thus, we cannot predict with confidence whether the court of appeals' decision will prove to be a bar to any substantial export of bobcats taken during the 1981-1982 season and in future years or whether, instead, the states will be able to supply the necessary population data this year, or in subsequent years, to permit "no detriment" findings to be made. Nor is it apparent at the present time that the submission of the population data necessary to support "no detriment" findings under the court of appeals' decision will impose an unacceptably heavy burden on the states.[11] There will be time enough at a later date for

[11] Petitioner has not, in our view, demonstrated that the court of appeals' decision will necessarily result in the devotion of an undue portion of state wildlife management resources to programs concerning bobcats. For example, we are unable to conclude at the present time that the decision below will require in each state and in each year the type of intensive trapping and tagging of bobcats petitioner contends would be necessary in each of 10 study areas in New Mexico

review by this Court once the consequences of the court of appeals' decision have been brought more sharply into focus.[12]

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alone. See Pet. 17. Even assuming such an intensive effort would be required at some locations, it is possible that population estimates developed in one state could be relied upon in making estimates for comparable habitats in other states or in other years, or that estimates for one type of habitat could, with appropriate adjustments, be relied upon for other types of habitats. Moreover, where the reliability of estimates may be questioned, the Fish and Wildlife Service nonetheless might be able to make "no detriment" findings after making special allowances for estimation errors. The court of appeals recognized that the Scientific Authority must have broad discretion in assessing and crediting population estimates (Pet. App. 19a), and we are not prepared at the present time to conclude that the court of appeals intended to require the impossible.

[12] Petitioner also contends (Pet. 17-18) that the court of appeals' requirement of reliable population estimates would be especially onerous if it were extended to other federal wildlife management programs, such as that under Section 4 of the Endangered Species Act, 16 U.S.C. 1533. See also the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*; the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.*; and the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. 1331 *et seq.* However, the court of appeals purported to rest its decision on the language of the Convention itself. See Pet. App. 15a-19a. The statutes just cited therefore are not directly affected by the decision below. If the court's analysis nevertheless is extended to cases arising under these statutes in the future, review may be sought in the appropriate case.

CONCLUSION

In all the circumstances, we are unable to conclude that further review is necessary at this time.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL ASSOCIATION OF FISH & WILDLIFE AGENCIES,
Petitioner,

v.

DEFENDERS OF WILDLIFE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

The arguments advanced in the memorandum for the federal respondents and the brief for respondent reinforce our contention that this case involves important questions regarding the role of the judiciary and the executive in implementing treaties which are not self-executing. Those questions, and the other issues raised by the petition, merit this Court's review.

1. The federal respondents state that the citizen suit section of the Endangered Species Act "provides the sole basis of jurisdiction in the present case" but ignore the critical question, which is whether Congress has incorporated the Convention on International Trade in Endangered Species ("CITES") into the Endangered Species Act so as to make that treaty judicially enforceable against the executive branch pursuant to the citizen suit provision. That provision authorizes any person to bring a civil action "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of this chapter [the Endangered Species Act]." 16 U.S.C. §1540(g)(1)(A). This language, of course, authorizes a civil

action, such as that brought by Defenders of Wildlife, against the Scientific and Management Authorities established under CITES only if those authorities have violated requirements imposed on them by the Endangered Species Act. That Act, however, imposes no such requirements.

Section 8(e) of the Act, as in effect when this case arose and was decided by the District Court, merely stated that the Management and Scientific Authorities "shall thereafter be *authorized* to do all things assigned to them under the Convention, including the issuance of permits and certificates." 16 U.S.C. §1537(e) (emphasis supplied). Congress thus refrained from incorporating CITES into the Endangered Species Act or enacting any requirement that the Management and Scientific Authorities comply with CITES. Congress chose instead only to provide the executive branch the authority necessary to carry out that Convention. Accordingly, the Endangered Species Act, as existing at the time this case was brought and decided, imposed no requirement that the executive branch comply with CITES. Allegations of violations of CITES do not constitute the allegations of violations of the Endangered Species Act necessary to support an action under the citizen suit provision. The federal respondent's reliance on the citizen suit provision is misplaced because Congress did not incorporate CITES into the Endangered Species Act or any other domestic law.

To hold that Congress incorporated all of CITES into domestic law merely by giving the executive branch authority to carry out CITES would be to invite excessive entanglement of the judiciary in the executive's implementation of international obligations. Such a rule would make the executive's decisions under treaties subject to judicial review and supervision when Congress intended only to authorize the executive to carry out those treaties and contemplated no role for the courts. Because of the great potential for difficulty and embarrassment created when the executive's interpretations and implementations of our international obligations are subject to review by the courts (see, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936)), Congress should be held to have in-

corporated a treaty which is not self-executing into domestic law and thereby to have made its implementation subject to judicial review only when Congress has expressed a clear intention to require that result. Under this test, Congress has not made the relevant provisions of CITES part of domestic law and, accordingly, they may not be enforced against the executive in federal court.

2. The brief for respondent tacitly acknowledges the difficulties which would be created by subjecting the executive branch's decisions under CITES to judicial supervision. In discussing the situation in which the judicial and executive interpretations of CITES differ, respondent suggests that the consequences of the judicial interpretation would be "entirely domestic" and that the 'executive branch will remain free to take any position it wishes in international negotiations." Brief for respondent, p. 9. The equanimity with which respondent views this situation is unjustified. First, decisions affecting international trade and the manner in which the United States carries out its international obligations can never be "entirely domestic" matters. Second, the executive will hardly be able effectively to advocate an interpretation of CITES in international negotiations if the United States implements a different interpretation pursuant to judicial order. To prevent this anomalous situation from developing, the judiciary should play a role in treaty implementation only when Congress clearly and unequivocally indicates it should do so. Congress has given no such indication with respect to CITES.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for writ of certiorari should be granted.[1]

Respectfully submitted,

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[1] Petitioner has limited this reply memorandum to those among the points raised by respondents which warrant reply. The limited scope of this memorandum should not be construed as abandonment of any of the arguments made in the petition.